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The Madras Law Journal Reports.

PART I. JULY, 1914. VOL. XXVII.

PRIVY COUNCIL.

Present:—Lords Shaw and Sumner, Sir John Edge and Mr. Ameer Ali.

(On Appeal from the High Court at Allahabad.)

Batuk Nath ... *Appellant.**

v.

Musammat Munni Dei and others ... *Respondents.*

Batuk Nath *v.* Musammat Munni Dei.

Indian Limitation Act 1877, *S.* 4 *2nd Schedule, Art.* 179.—*Decree—Registration—Practice—Dismissal of appeal for non-Prosecution under Rule V of Order in Council dated June* 13, 1858.

Where an appeal to the Privy Council from a decree of the High Court in a mortgage suit stood dismissed for want of prosecution under Rule V of the Order in Council of June 13, 1853.

Held; that Art. 179 of the Limitation Act governed the case and that time ran from the date of the High Court decree and not from the date of the dismissal of the appeal in the Privy Council as there was no final order or decree of the Privy Council dismissing the appeal and also none was necessary under the rule.

Appeal from a Judgment and decree of the High Court dated June 4, 1910 affirming a Judgment and decree of the Court of the Subordinate Judge of Agra dated Sep. 8, 1908.

The facts of the case on which the decision of the Privy Council is based had been sufficiently set forth in their Lordships' Judgment.

De Gruyther K. C. and Parikh for the appellant contended that the decree of March 29, 1908 was never made absolute and was therefore still operative. The Court had power to extend the time to pay off the prior mortgage debt and under the circumstances ought to have exercised the power.

Sir E. Richards K. C. and Dube appeared for the respondents but were not called upon.

The judgment of their Lordships was delivered by

Sir John Edge.—This is an appeal from a decree, dated the 4th June 1910, of the High Court of Judicature at Allahabad, which dismissed an appeal by the appellant here from a decree of the Subordinate Judge of Agra, dated the 8th September 1908,

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Munni Dei.

dismissing an application which had been made on the 2nd October 1907 to the Court of the Subordinate Judge by Babu Batuk Nath for the execution of a decree of the 29th March 1898.

The decree of the 29th March 1898 had been made by the then Subordinate Judge of Agra in favour of one Sheo Narain in a suit which had been brought by him under the Transfer of Property Act, 1882, for sale of immoveable property. By that decree it was ordered that if Sheo Narain should fail to pay a prior mortgage debt within five months from the 29th March 1898 his suit should stand dismissed with costs. From that decree of the 29th March 1898 an appeal was brought to the High Court of Judicature at Allahabad. That appeal was dismissed by the High Court by its decree of the 12th February 1900, but in dismissing the appeal, the High Court extended the time for payment of the prior mortgage debt to the 9th August 1900. It has not been alleged or proved that any certified copy of the decree of the 29th March 1898 was registered within the meaning of Article 179 of the Second Schedule of the Indian Limitation Act, 1877. From the decree of the 12th February 1900 of the High Court an appeal to His Majesty in Council was brought. On the 15th December 1904 the appeal to His Majesty in Council stood dismissed for non-prosecution under Rule V. of the Order in Council of the 13th June 1853 without further order.

On the 26th September 1901 Sheo Narain had assigned his decree of the 29th March 1898 to Babu Batuk Nath. During the pendency of the appeal to His Majesty in Council some orders had been made by the Court of the Subordinate Judge of Agra extending the time for the payment of the prior mortgage debt, but the last application for an extension of time for the payment of the prior mortgage debt which was made to his Court was dismissed by the then Subordinate Judge of Agra by his order of the 20th March 1902, and on the 7th June 1902 the Subordinate Judge dismissed an application for a review of his order of the 20th March 1902.

In making his decree of the 8th September 1908 dismissing the application of the 2nd October 1907, the Subordinate Judge held that the period of limitation which was applicable to the case ran from the dismissal for want of prosecution of the appeal to

His Majesty in Council, that is to say, from the 15th December 1904, and consequently that the application for execution had been made within time; he doubtless was under the impression that the appeal had been dismissed by an order of His Majesty in Council made in the appeal. The Subordinate Judge dismissed the application on the ground that the terms as to the payment of the prior mortgage debt imposed by the decree of the 29th March 1898, not having been complied with within the extended time the suit by the terms of that decree had stood dismissed. The attention of the learned Judges of the High Court does not appear to have been drawn to the question of limitation; they dismissed the appeal to their Court on the ground upon which the application had been dismissed by the Subordinate Judge.

It appears to their Lordships that the application of the 2nd October 1907 was made after the period of limitation prescribed for such an application by Article 179 of the Second Schedule of the Indian Limitation Act, 1877, had expired, and that the application should in accordance with S. 4 of that Act, have been dismissed unless the dismissal of the 15th December 1904 for want of prosecution of the appeal to His Majesty in Council was by a final decree or order of his Majesty in Council made in the appeal. There was, however, no order of His Majesty in Council dismissing the appeal, nor was it necessary that any such order should be made in the appeal. Under Rule V. of the Order in Council of the 13th June 1853, the appellant or his agent not having taken effectual steps for the prosecution of the appeal, the appeal stood dismissed without further order.

As their Lordships hold that the application of the 2nd October 1907 was barred by limitation, and should on that ground have been dismissed, they do not consider it necessary to express any opinion on the grounds upon which the High Court made the decree which is under appeal. Their Lordships will humbly advise His Majesty that this appeal should be dismissed. The appellant must pay the costs of this appeal.

Solicitor for Appellant—*Edward Dalgado.*

Solicitors for Respondents—*Barrow Rogers & Neville.*

PRIVY COUNCIL.

Present:—Lords Shaw, Moulton and Mr. Ameer Ali.

(On Appeal from the High Court at Calcutta.)

Arthur Henry Forbes ... *Appellant.**

v.

Maharaj Bahadur Singh and others ... *Respondents.*

Arthur Henry Forbes *v.* Maharaj Bahadur Singh.

Patni Regulation (VIII) of 1819, Secs. 8, 11, 11 (2) & 11 (4)—Bengal Tenancy Act, (VIII) of 1885, Secs. 65, 66 & 148 Cl. (h) & 195—Landlord and tenant—Continuance of relationship.

Where a landlord transferred his interest in the Zamindari reserving only the right to recover the arrears of rent from the Patnidar and in execution of the decree which he subsequently obtained for the same, sought to sell the tenure under S. 65 of the Bengal Tenancy Act free of the undertenures.

Held, that S. 65 of the Bengal Tenancy Act applies only to cases where the relationship of landlord and tenant exists both at the date of the decree and when the decree is sought to be executed.

Held further, that the Patni Regulation of 1819 being a self-contained enactment expressly excluded from the operation of the Bengal Tenancy Act the right of the decree-holder under the latter act could not prevail against the special lien created in favour of a Darpatnidar who had paid up the subsequently accrued arrears due to the transferee and taken possession of the tenure under the provisions of that Regulation.

Appeal from a Judgment and Decree of the High Court dated April 8, 1908 reversing a Judgment and Decree of the Subordinate Judge of Purneah, dated September 14, 1910.

The facts of the case have been sufficiently set forth in their Lordships' Judgment.

De Gruyther, K. C. and Dunne for the appellant contended that the appellant's charge on the patni still subsisted. The decree obtained by the respondents was not a rent decree within the meaning of S. 65 of the Bengal Tenancy Act. They were assignees of the said decree within the meaning of S. 134 (*h*) of the said Act. The decree did not constitute a charge upon the said patni tenure. The appellant was a Dar-patnidar and being placed in possession of the patni by virtue of the patni Regulation he was entitled to a charge upon the patni tenure by reason of depositing money to save the tenure in question in priority to that claimed by the respondents. The tenure could not be sold by the respondents in execution of their decree free from the appellant's charge.

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* 4th March 1914.

Arthur Henry Forbes v. Maharaj Bahadur Singh.

Reference was made to Bengal Tenancy Act of 1885, Ss. 148 9, 21 & 103, 65 & 66.

Land Registration Act of 1876; Ss. 87, 79, 38 & 42.

Patni Regulation of 1819 Ss. 10, 11, & 8 *Nagendra Nath Bose* v. *Bhuban Mohan Chakravarti.*[1]

Sir Robert Finlay K. C. and *Ross K. C.* for the respondents contended that the respondent's decree was for rent and therefore could be enforced against the patni under the provisions of the Bengal Tenancy Act. As it was for rent it was the first charge on the patni and had priority over the lien claimed by the appellant.

The patni could lawfully be sold free from the said lien.

De Gruyther K. C. in reply.

The Judgment of their Lordships was delivered by

Mr. Ameer Ali:—This appeal, which is from a Judgment and Decree of the High Court of Calcutta, dated the 8th of April 1908, raises certain questions of particular importance under the Rent Law of Bengal, for the proper apprehension of which it is necessary to set out in some detail the facts of the case.

The zamindari of Lot Saifganj, situated in the district of Purneah, was owned at one time by a rich zamindar of the name of Roy Dhanpat Singh, since deceased. The estate, however, was settled in Patni, and has been held for some years past by the defendant Chatrapat Singh as the Patni Talookdar; Chatrapat, on his side, has settled the Patni tenure in several parcels with subordinate tenure-holders called Dar-patnidars. Two of these Dar-patnis are held by the Plaintiff-Appellant. These tenures are special to Bengal, the Sonthal Pergunas and certain parts of Chota Nagpur, and their incidents are governed by Regulation VIII of 1819, commonly called the Patni Regulation. To some of these incidents reference will be made in the course of this Judgment.

But it may be conveniently premised here that a Patni Talook is a permanent, heritable and transferable tenure, which the zamindar may create over the whole or part of his estate, whilst the Patni Talookdar has a similar right to let the entire property held by him in Patni or in parcels to subordinate Talookdars called Dar-patnidars. And this process of subinfeudation may, so far as the law is concerned, be carried down

1. 6. C. W. N. 604.

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to several lower degrees. In the case of these tenures the zamindar has a right to apply to the Collector to put up the Patni Talook to sale for arrears of rent, and the sale has the effect of cancelling all under-tenures; but the subordinate tenure-holders have the right to deposit in the Collector's Court the arrears of rent, and to be put in possession of the defaulting superior tenure for the satisfaction of the deposit made by them. The same right which the zamindar possesses for the realisation of his rent, with the correlative right on the part of the subordinate tenure-holders of saving the superior tenure from sale, is given to them in succession.

On the 27th of June 1893 Dhanpat Singh transferred the zamindari, subject of course to Chatrapat's Patni, to a Hindu lady, Bhagwanbati Chowdhrain, who has unquestionably been in possession of the estate since her purchase.

It appears that certain arrears of rent in respect of the Patni had become due before the sale to Bhagwanbati Chowdhrain. For these arrears Dhanpat Singh brought a suit in the Civil Court on the 21st September 1893. The final Decree in this action was passed by the High Court on the 10th of July 1896. Nine days after, Dhanpat Singh executed a Deed of Trust by which he assigned to the Defendants 2 to 4 in trust for the Defendant Maharaj among other properties the Decree for arrears of rent.

Dhanpat Singh died shortly after, leaving Maharaj his only son and heir.

In 1897 the Trustees proceeded to execute the decree against Chatrapat but were met with various objections on his part which were finally overruled by the High Court in 1899.

In the meantime Chatrapat had fallen into arrears in respect of the Patni rent payable to the Chowdhrain; and that lady had instituted in the Court of the Collector of Purneah the special proceedings under Regulation VIII of 1819 for the realisation of her dues. The defaulting tenure was accordingly advertised for sale on the 14th of May 1901. The Plaintiff-Appellant thereupon deposited the amount of the arrears in the Collector's Court and was put by him in possession of the Patni Talook. Since then he has been and still is in possession of the superior tenure paying rent to the zamindar and realising the rents due to the Patni Talookdar from the subordinate holders.

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The Trustee Defendants, having obtained the decision of the High Court that they were entitled to execute Dhanpat Singh's decree, applied for the sale of the Patni Talook under S. 163 of the Bengal Tenancy Act. It is to be observed that a sale held under this section does not give power to the decree-holder to annul "notified and registered incumbrances." The plaintiff thereupon preferred a claim under Section 278 of the Civil Procedure Code of 1882, which, however, after some protracted proceedings, was withdrawn. Apparently a sale under S. 163 was held, but it did not fetch a sum sufficient to liquidate the arrears and costs, and the defendants then applied for a sale under S. 165 under which the decree-holder has the power to annul all incumbrances including under-tenures. On this application the 6th of August 1906 was fixed for the sale of the Patni. The present suit was then brought by the plaintiff on the 9th of July in the Court of the Subordinate Judge of Purneah to restrain the defendants from proceeding with the sale.

It should be noted here that there exist many permanent, heritable, and transferable tenures in Bengal which do not come within the purview of Regulation VIII of 1819, and which have no relation to Patni Talooks. The incidents of these tenures are governed by the Bengal Tenancy Act passed in 1885, to regulate, subject to certain exceptions to which attention will be drawn, the relations in general between landlord and tenant.

The Bengal Tenancy Act of 1885, whilst it protected the permanent tenure-holder and other tenants having similar permanent interests against ejectment for arrears of rent, gave to the landlords certain rights which they either did not possess before or possessed only in a qualified form. One was the right to bring to sale the tenure or holding in execution of a decree for arrears of rent. S. 65, which declares this liability of the defaulting tenure, also declares that "the rent shall be a first "charge thereon." It is round these words that the controversy between the parties is mainly centred. Their Lordships say mainly, because there is another question of vital importance in this case which relates to the applicability of the provisions of the Bengal Tenancy Act to Patni tenures.

The defendants in their endeavours to bring Chatrapat's Patni Talook under the provisions of S. 165 of the Tenancy Act

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contend that as the relationship of landlord and tenant existed between Dhanpat Singh and Chatrapat when the rents became due, the decree obtained by him became by virtue of S. 65 a first charge on the tenure. The plaintiff's contention, on the other hand, is that as Dhanpat Singh had parted with his interest in the *zamindari* before the institution of his suit for arrears, the decree of which execution was sought was not a rent decree within the meaning of S. 65.

The Subordinate Judge has upheld the plaintiff's contention, and granted him an injunction restraining Maharaj Bahadur and the Trustee Defendants, who are called in the suit "first party defendants," from executing their decree of the 10th of July 1896 against the Patni under the provisions of the Bengal Tenancy Act. His decision has been reversed by the High Court on appeal and the plaintiff's suit been dismissed with costs. The learned Judges considered that the decree being for rent the mere fact that the *zamindar* had sold the estate after it became due does not affect his right to "a first charge." At least that is what their Lordships understand to be the meaning of the learned Judges in the following passage of their judgment:—

"The Decree of the 10th July 1896 is a decree for rent. Rai Dhanpat Singh "was the landlord at the time when the rent he sued for accrued due. His claim "for rent when found due, became a 'first charge' on the patni. There is nothing "in the law which disentitles him to a first charge, because after the accrual of the "rents he sued for, he parted with his interest in the zamindari."

This conception is further developed at a later stage of their Judgment, where they say as follows:—

"Now, no doubt, the decision of this Full Bench does not deal with a case "such as the present, in which the landlord had parted with his interest before he "instituted his suit for rent, but it would seem to follow that if he can execute a "decree for arrears of rent as a rent decree after he has parted with his interest as "landlord, he can also do so when he obtained his decree for rent, even after he had "parted with his interest in the property. The character of the decree a suitor "obtains, depends on the nature of the claim and of his right to the relief sought "for, and is not altered by any change in his position which may have taken place "subsequent to the accrual of his right to sue."

Their Lordships cannot help observing that the learned Judges have fallen into an error in drawing an inference of law in support of their conclusion from a decision which was obviously based on facts different from those with which they had to deal. In the Full Bench case of *Khatra Pal Singh* v. *Krilarthamoyi Dassi* (I. L. R., 33 Cal. 566), the landlord did not

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part with the property and put an end to the relationship of landlord and tenant until after the decree in his suit for rent; whereas in the present case he transferred his interest to Bhagwanbati Chowdhrain before his suit for the arrears. The broad question, however for determination in this appeal is whether the special right created in favour of the landlord under Section 65 can be claimed also by one who has parted with the property which gives this right and to which it is attached.

There is no doubt that there is a divergence of opinion among the Judges of the High Court of Calcutta with regard to the construction of Section 65. The section itself runs as follows:—

"Where a tenant is a permanent tenure-holder, a raiyat holding at fixed rates "or an occupancy-raiyat, he shall not be liable to ejectment for arrears of rent, "but his tenure or holding shall be liable to sale in execution of a decree for the "rent thereof, and the rent shall be a first charge thereon."

It is not a happily worded section, and the words "and the rent shall be a first charge thereon," seem, from their collocation, to have been inserted as an afterthought without sufficient consideration of their applicability to the rest of the provisions contained in the section. They give no indication as to when it becomes a "first charge." Does it become a first charge from the nature of the claim, as some of the learned Judges seem to imagine, or does it become a first charge after it has been ascertained and made the subject of a decree? Again, the section does not sufficiently indicate at whose instance the tenure or holding shall be liable to sale in execution of a decree for rent thereof, though from the reason of the thing it is obvious that it must be at the instance of the landlord,

These questions cannot, therefore, be answered by a reference to the mere section itself; to understand its meaning, their Lordships apprehend, the general scope of the Statute as well as of the chapter in which it occurs, must be taken into consideration. The Act, as stated in the preamble, was designed "to amend and consolidate certain enactments relating to the "Law of Landlord and Tenant." The words "tenants," "land-"lord," and "rent," are carefully defined. "Landlord" is "declared to mean "a person immediately under whom a tenant "holds, and includes the Government," whilst "rent" is declar-"ed to mean "whatever is lawfully payable or deliverable in

"money or kind by a tenant to his landlord on account of the use "or occupation of the land held by the tenant," Chapter VIII. "embodies the "general provisions as to rent." After dealing with "rules and presumptions as to amount of rent," "the alteration "of rent," "the payment of rent," receipts and accounts," "deposit "of rent" in Court when the landlord refuses to receive payment, "it treats of "arrears of rent." The governing idea throughout the multifarious provisions contained in Chapter VIII, to regulate the respective rights and obligations of landlords and tenants, is the subsistence of the relationship that gives rise to those rights and obligations.

S. 65 declares that a certain class of tenants shall not be liable to ejectment for "arrears of rent," but that their tenure or holding "shall be liable to sale in execution of "a decree for the rent thereof." S. 66 provides that in the case of other tenants not coming within the purview of S. 65, the landlord "may institute a suit to eject" the defaulting tenant. The two sections taken together cover practically the remedies provided by law for the landlord to recover arrears of rent. One section is the exact corollary of the other. The right to proceed to sale in one case, in the other to eject, is dependent on the existence of the relationship of landlord and tenant at the time when the remedy provided by law is sought to be enforced. A reference to S. 148, Clause (*h*), clearly shows that the right to apply for the execution of a decree for arrears was attached to the status of the decree-holder *qua* landlord. It declares that "notwithstanding anything contained in S. 232 of the Civil "Procedure Code an application for the execution of a decree "for arrears obtained by a landlord shall not be made by an "assignee of the decree unless the landlord's interest has become "and is vested in him."

The prohibition contained in this section refers to decrees obtained by the landlord under S. 65. To acquire the right which the section gives, not only the person obtaining the decree must be the landlord at the time, but the person seeking to execute it by sale of the tenure must have the landlord's interest "vested" in him. In other words, the right to bring the tenure or holding, as the case may be, to sale exists so long as the relationship of landlord and tenant exists.

It seems to their Lordships clear on an examination of the different sections bearing on the subject that the right to bring the tenure or holding to sale under S. 65 appertains exclusively to the landlord; and that a person to whom certain rents are due, and who obtains a decree therefor after he has parted with the property in which the tenancy is situated, has no such right. The contrary view, their Lordships think, would give rise to a very anomalous situation. A *zamindar* to whom certain arrears are due, as in the present case, may sell his property, without assigning, for purposes of his own, the back-rents as he is entitled to do; he may then sue for those back-rents; before any decree is made in this suit, the tenant falls into arrears to the new landlord who brings a similar suit. Both the ex-landlord and the present landlord obtain decrees for their respective arrears. In whose decree and on whose application is the tenure to be sold? The question admits of only one answer—that it is the existing landlord alone who can execute the decree; the ex-landlord is an outsider, and whilst he can execute his decree against the debtor as a money-decree, he has no remedy against the tenure itself.

The learned Judges of the High Court seem to think that either from the nature of the debt being arrears of rent, or the decree being for arrears of rent, the tenure becomes *ipso facto* hypothecated so to speak for the debt; and that consequently the person to whom the debt is due, although he has ceased to be the landlord, and is to all intents and purposes so far as other rights and obligations under the law are concerned, a total stranger to the property with which those rights and obligations are inseparably connected, he has the special remedy given to the landlord to recover arrears attached to the tenure. This conception of the legal position seems to their Lordships untenable, for the charge created by S. 65 is clearly in favour of the landlord.

There is another equally fatal objection to the application of the contesting defendants to bring to sale the Patni tenure in execution of Dhanpat Singh's decree.

The Patni Regulation is a self-contained Statute. It lays down certain well-defined rules for the realisation by the *zamindar* of arrears of rent from a tenure holder; it makes the tenure primarily liable, and it gives to the zamindar the right of applying to the Collector for the periodical sale of defaulting talooks.

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S. 8 provides for the manner in which the zamindar, that is "the proprietor under direct engagement to Government," "shall be entitled to apply for the sale of these tenures.

S. 11 declares that—

"any taluq or saleable tenure that may be disposed of at a public sale, under the "rules of this Regulation, for arrears of rent due on account of it, is sold free of all "incumbrances that may have accrued upon it by act of the defaulting proprietor, "his respresentatives, or assignees."

It is unnecessary to refer to the rest of this section for the purposes of this Judgment.

S. 13 provides the method by which the "holder of a "talook of the second degree" may save his tenure "from the "ruin that must attend" the sale of the superior tenure.

Sub-section 2 declares—

"Whenever the tenure of a taluqdar of the first degree may be advertised for "sale in the manner required by the second and third clauses of Section 8 of this "Regulation, for arrerrs of rent due to the zamindar, the taluqdars of the second "degree, or any number of them, shall be entitled to stay the final sale, by paying "into Court the amount of balance that may be declared due by the person attending "on the part of the zamindar on the day appointed for sale; in like manner they "shall be entitled to lodge money antecedently, for the purpose of eventually "answering any demand that may remain due on the day fixed for the sale, and, "should the amount lodged be sufficient, the sale shall not proceed, but after mak-"ing good to the zamindar the amount of his demand, any excess shall be paid back "to the person or persons who may have lodged it."

And Sub-section 4 after referring to certain conditions which it is unnecessary to consider here, declares that "such deposit "shall not be carried to credit in, or set against, future demands "for rent, but shall be considered as a loan made to the proprie-"tor of the tenure preserved from sale by such means, and the "taluq so preserved shall be the security to the person or persons "making the advance, who shall be considered to have a lien "thereupon, in the same manner as if the loan had been made "upon mortgage; and he or they shall be entitled, on applying "for the same, to obtain immediate possession of the tenure of "the defaulter, in order to recover the amount so advanced from "any profits belonging thereto."

It will be seen, therefore, that the Appellant in this case, by his admitted deposit of the arrears for which the superior tenure was advertised for sale at the instance of the Chowdhrain zamindar, acquired the special lien expressly created by the Regulation which may well be called a statutory salvage lien arising not from

any implication of the law but under the express directions and declarations of the Act. Arthur Henry Forbes v. Maharaj Bahadur Singh.

Regulation VIII. of 1819 being thus, as already observed, a self-contained Act embodying the rules relative to the rights of Zamindars and Patni talukdars, the Legislature in enacting Act VIII. of 1885 excluded in express terms from the operation of the Tenancy Act the special legislation relating to Patni tenures. S. 195 of Act VIII, of 1885 declares (omitting the immaterial portions) that "nothing in this Act shall affect . . . . "any enactment relating to Patni tenures, so far as it relates to "those tenures."

The Plaintiff's right to hold the Patni talook exempt from any proceeding under the Tenancy Act, is founded on steps taken by him under the Patni Regulation.

For these considerations their Lordships are of opinion that the Judgment and Decree of the High Court should be set aside, and the Decree of the Subordinate Judge restored. The first party Defendants, the contesting Respondents must pay the costs of this Appeal and of the Appeal to the High Court.

And their Lordships will humbly advise His Majesty accordingly.

Solicitors for Appellant—*T. L. Wilson & Co.*

Solicitors for Respondents—*Downer & Johnson.*

PRIVY COUNCIL.

Present:—Lords Moulton, Sumner and Parmoor, Sir John Edge and Mr. Ameer Ali.

(On Appeal from the High Court at Allahabad.)

Lala Mahabir Prasad and others ... *Appellants.**

v.

Mussamat Taj Begam and others ... *Respondents.*

Lala Mahabir Prasad v. Mussamat Taj Begam.

Pardanashin lady—Deed—Execution—Formalities for validity—Relationship of client and legal adviser—Clause for substituting properties allotted at partition for mortgaged property—Validity of—Knowledge of relations—sufficiency of, to discharge burden.

Held: Where the legal adviser of a Pardanashin lady acts the part of a money-lender to his client and procures the execution by her of a mortgage bond to secure its repayment, the Court is entitled as well as bound to examine the transaction with closer scrutiny than ordinarily and to insist sternly on the mortgagee showing clearly that his client was fully aware of the meaning and effect o the deed and that the transaction was a fair and honest one.

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* 18th March, 1914.

Lala Mahabir Prasad v. Mussamat Taj Begam

Where there was a clause in a mortgage deed that after partition between the mortgagee and her co-sharers, the property allotted to her at the partition should be substituted for the mortgaged properties as security.

Held; that if the mortgage was otherwise valid, the clause would have been legally operative and subjected the whole of the lady's share to the mortgage.

Quaere, if the fact that the relatives of the lady must have been aware of the transaction is sufficient to support the deed in the absence of evidence that the transaction was explained to the lady and its legal effect was clearly understood by her.

Consolidated appeals by special leave from Judgments and decrees of the High Court dated December 2, 1910 reversing a Judgment and decree of the Additional Judge of Meerut, dated January 12, 1909.

The facts of the case have been sufficiently set forth in their Lordship's Judgment.

De Gruyther K. C. with him *Dube* for the appellants contended that the respondent lady executed the bond in suit after fully understanding the nature and the effect thereof and with her free consent. She received adequate consideration. Her relatives were also helping her and protecting her interests.

[*Sir John Edge.*—You are not suing the lady for ordinary debt, but for the performance of a contract with compound interest.]

[*Lord Moulton*:—If it were a simple contract debt, there would have been limitation.]

The lady entered into the transaction with her eyes open.

Dunne appeared for the respondents but was not called upon.

The Judgment of their Lordships was delivered by

Lord Moulton:—In this case their Lordships have before them two appeals from two decrees and judgments dated 2nd December 1910, of the High Court of Judicature for the North-Western Provinces, Allahabad. The suit in which these appeals are brought is a suit for the recovery of money due on a registered mortgage bond alleged to have been executed by the defendants Mussamat Taj Begum and Syed Sultan Muhammad Khan in favour of Lala Ramanuj Dayal (since deceased), father of the appellants. The facts of the case are as follows.

Mussammat Taj Begum is a *pardanashin* woman, and Sultan Muhammad Khan is her younger brother. Prior to June 1895 they had been engaged in law suits with the members of their family to recover their shares of inheritance in the property of their father Syed Mir. Khan, and one Babu Raghubir Saran

had been the pleader representing them in these suits. The litigation terminated in their favour, and a decree of partition had been pronounced, but the time for appeal had not expired, and it is not seriously contested that at the date of the execution of the mortgage bond Babu Raghubir Saran still stood to the defendants in the position of their legal adviser. The mortgage bond was nominally executed in favour of Lala Ramanuj Dayal, but it is admitted that he was only *benamidar* for Babu Raghubir Saran who was the real mortgagee. The amount of the money advanced by the mortgagee was 8,000 rupees, of which 4,773 is said to have been cash, and the balance went mainly, if not entirely, in the discharge of moneys due from the defendant Syed Sultan Muhammed Khan. The greater part of this indebtedness appears to have been to Babu Raghubir Saran himself. The whole of the property mortgaged belonged solely to Mussamat Taj Begum.

It follows, therefore, that we have a case of the legal adviser to a *pardanashin* woman acting the part of money lender to her, and procuring the execution by her of a mortgage bond to secure its repayment. It is difficult to conceive a case in which the Court would be entitled, and indeed obliged, to examine the transaction with closer scrutiny, or to insist more sternly on the mortgagee supporting the heavy onus of showing that the client was fully aware of the meaning and effect of the deed, and that the transaction was a fair and honest one. The appellants have entirely failed to support either of these issues. The Judge of the Court of First Instance has found that the interest, which was compound interest at the rate of 1 per cent. per month (with half-yearly rests) was unconscionable, and has accordingly reduced it, and although an appeal was brought against this part of his decision it was dismissed by the High Court, and the appeal against that decision has not been persisted in before their Lordships. The case of the appellants with regard to the other issue is equally hopeless. There are concurrent decisions of the two Courts to the effect that the plaintiffs have failed to prove that the meaning and effect of the mortgage bond was duly explained to the real defendant Musammat Taj Begum. The facts relating to this issue are as follows.

The property set out in the schedule to the mortgage bond as being the property mortgaged, consisted of property belonging

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to and in the possession of the defendant Musammat Taj Begum.' But a clause was inserted in the mortgage bond to the effect that after the partition should have been effected the property awarded to that defendant in that partition should be substituted for the scheduled properties. It is admitted that the effect of this clause would be to quadruple the amount of property mortgaged. The Judge of First Instance finds that there is no evidence that this was properly explained to Musammat Taj Begum, but holds that this does not invalidate the execution because in his opinion the clause would be inoperative. Their Lordships are unable to agree with this opinion. The clause is clear in its language, and if the mortgage bond had been valid would have subjected the whole of the lady's share to the mortgage. The High Court also finds that the plaintiffs have not shown that this clause was properly explained to the lady, and their Lordships entirely concur in its finding.

It follows therefore that as against the present appellants it must be taken that the terms of the mortgage bond were extortionate and that the lady, the mortgagor, did not understand the effect of the deed by reason of its not having been adequately explained to her. The deed is therefore void and cannot be enforced against her.

The Judge at the trial who decided in favour of the deed (subject to alteration in respect of the rate of interest) appears to have been influenced by the consideration that the relatives of the lady must have been aware of the transaction because her brother was a co-signatory of the deed, and two of her relatives were the indentifying witnesses. Apart from the question of the sufficiency of such a consideration their Lordships are of opinion that the facts of the case entirely destroy any inference that the relatives of the lady were acting as a protection to her in the transaction. Her brother was personally interested in carrying through the transaction, because by it he obtained the discharge of debts for which he alone was primarily liable, and this relief was obtained by mortgaging property in which he had no interest. With regard to the other relatives it is clear that the family generally were taking gross advantage of the unprotected state of this *pardanashin* lady. She had been betrothed but the relations would not give consent to her marriage unless she surrendered the whole of her share in the family property. Their Lordships can

only express their great surprise that under these circumstances the relatives should have been regarded by the Trial Judge as defenders of the lady's interests.

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This point is sufficient to decide the case, it is not necessary to refer to other points raised in the proceedings.

Their Lordships will therefore humbly advise His Majesty that these appeals should be dismissed with costs.

Solicitors for appellants:—*Barrow, Rogers & Nevill.*

Solicitor for respondents:—*Douglas Grant.*

PRIVY COUNCIL.

Present:—Lord Moulton, Sir John Edge and Mr. Ameer Ali

(On Appeal from the High Court at Allahabad.)

Chaudri Abdul Majid ... *Appellant.**

v.

Jawahir Lal and others ... *Respondents.*

Practice—Dismissal of appeal for non-prosecution—no decree—Limitation Act of 1877, Art. 179.

Where an appeal to the Privy Council from a judgment of the High Court confirming an *order nisi* passed in a mortgage suit was dismissed for non-prosecution:

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Held, that the order dismissing the appeal for want of prosecution did not deal judicially with the matter of the suit and could in no sense be regarded as an order adopting or confirming the decision appealed from and that therefore, the position was as if there had been no appeal at all.

Held, further that the period of limitation for the enforcement of the decree of the lower court was 3 years as prescribed by art. 179 of the Indian Limitation Act, 1877.

Held, also that inasmuch as the right to enforce the decree had been barred before the passing of the new Civil Procedure Code it did not operate to revive it.

Appeal from a Judgment and Decree of the High Court dated Aug. 5, 1910 affirming a Judgment and decree of the Court of the Subordinate Judge of Allahabad dated Oct. 6, 1909.

The facts of the case are sufficiently set forth in their Lordship's Judgment.

Lowndes for the appellant contended that the application by the Respondents ought not to have been treated as an application to enforce the Order of His Majesty in Council of May 13, 1901. The order did not purport to be and ought not to be treated as a decree in the suit deciding the rights of the parties under the mortgage and was not capable of enforcement in execution as sought by the respondent. In any view of the said application it was barred by limitation.

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* 7th April 1914.

Chaudri Abdul Majid v. Jawahir Lal

[*Lord Moulton* :—Appeal is no stay.]

[*Lord Moulton* :—There is no execution here, there is no appeal. Order for non-prosecution is anything but allowing the appeal. It only says that it is of no effect. Dismissal for non-prosecution does not raise it into a decree of the Privy Council.

Reference was made to *Beni Rai* v. *Ram Lakan* [1] O. 34, R. 5 of the C. P. Code, 1908; Art. 183 of the Limitation Act of 1908. Ss. 88 & 89 of the Transfer of Property Act 1882 repealed by Order 34, Rr. 4 & 5 of the Civil Procedure Code of 1908 *Batuk Nath* v. *Munni Dei* [2].

De Gruyther K. C. and Dube for the respondents contended that the proceedings were started under the old Civil Procedure Code of 1882 and therefore all the subsequent proceedings should be dealt with in accordance with the provisions of the same.

[*Lord Moulton* :—Yours was an application to enforce the decree of this Board.]

Effect of dismissal of an appeal or of a petition in India was to incorporate it into the original appeal to His Majesty in Council.

[*Lord Moulton*:—You will enforce that Order of His Majesty in Council with costs. There was no enforceable order.]

Lord Moulton :—The point is whether the order of the lower court merged into that of the Privy Council. It applies to acts in India and not to P. C.]

Reference was made to *Rajah Tasadday Rasul Khan* v. *Manik Chand* [3] *Lachman Parshad* v. *Kishun Parshad* [4] :—

Lowndes was not called on to reply.

The Judgment of their Lordships was delivered by

Lord Moulton—In this case the relevant facts necessary and sufficient to determine their Lordships' decision on the Appeal are very simple and are undisputed.

The appellant is in the position of mortgagor and the respondent of mortgagees under a mortgage dated 3rd September 1868.

1. (1898) I. L. R. 20 867 P. C.
2. (1914) 27 M. L. J. 1.
3. (1902) L. R. 30 I. A. 35.
4. (1882) I. L. R. 8 C. 218 F. B.

Chaudri Abdul Majid v. Jawahir Lal

In 1889 a suit was commenced before the Subordinate Judge of Allahabad to enforce that mortgage, and on 12th May 1890 a decree was passed by him for the sale of the property unless payment was made on or before 12th August 1890. An appeal was brought from that decree to the High Court and on 8th April 1893 that appeal was dismissed and the decree of the Subordinate Judge confirmed. The mortgagor obtained leave to appeal to this Board but did not prosecute his appeal, and on 13th May 1901 the appeal was dismissed for want of prosecution.

The present appeal relates to an application to the Subordinate Judge, dated 11th June 1909, for an order absolute to sell the mortgaged properties; in other words, for an order directing enforcement of the order *nisi* which had been confirmed by the decision of the High Court of 8th April 1893. It is not necessary to go into the particulars of this application because their Lordships are of opinion that any such application was barred by the Statute of Limitation, Article 179, at the expiry of three years from the date of the decree, and therefore before the passing of the Code of Civil Procedure of 1908 under which the present proceedings purported to be taken, and their Lordships have no doubt whatever that inasmuch as the right to enforce the decree had once been barred no provisions of the Civil Procedure Code, 1908, operate to revive it.

The chief matter of argument before this Board was a contention that the decree which it is sought to enforce had been constructively turned into a decree of His Majesty in Council and assigned to the date of 13th May 1901 by virtue of the dismissal of the appeal for want of prosecution on that date, and that therefore the period of limitation was 12 years from 13th May 1901 by virtue of Article 180 of the Indian Limitation Act. Their Lordships see no foundation for this contention, which appears to have been the basis of the decision of the Courts below. The order dismissing the appeal for want of prosecution did not deal judicially with the matter of the suit and could in no sense be regarded as an order adopting or confirming the decision appealed from. It merely recognised authoritatively that the appellant had not complied with the conditions under which the appeal was open to him, and that therefore he was in the same position as if he had not appealed at all. To put it shortly, the only

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decree for sale that exists is the decree dated 8th April 1893, and that is a decree of the High Court of Allahabad. The operation of this decree has never been stayed, and there is no decree of His Majesty in Council in which it has become merged. The period of limitation applying to the enforcement of it at all material times was therefore a period of three years. The respondents' right is therefore barred by limitation.

Their Lordships will therefore humbly advise His Majesty that this appeal should be allowed, and that the application of 11th June 1909 should be dismissed and that the respondents should pay the costs of that application and of the appeal to the High Court as well as of this appeal.

Solicitors for appellant. *Douglas Grant.*

Solicitors for Respondent. *Barrow, Rogers and Nevill.*

PRIVY COUNCIL.

Present:—Lord Moulton, Sir John Edge and Mr. Ameer Ali.

[On Appeal from the High Court at Calcutta.]

John King & Co. Limited ... *Appellants.**

v.

The Chairman of the Municipal Commissioners of Howrah and others ... *Respondents*

John King and Co Ltd. v. Municipal Commissioners Howrah.

Possession—Title deeds—Conveyances—Complete devolution—Description of lands found consistently in deeds—Registered deeds.

Where the plaintiff claimed a certain portion of land and produced duly registered conveyances, mortgages, reconveyances, and other title deeds extending over a period of 60 years, and also proved that during the period had leased portions of land by leases that were registered.

Held: that there was no reason to consider the documents produced as not being plaintiff's title deeds and clear title being proved plaintiff should succeed.

Held also that the description of the parcels which were to be found consistently in the deeds must be followed in fixing the boundary.

Appeal from a judgment and decree of the High Court dated July 25th 1910 reversing a judgment and decree of the Second Subordinate Judge of Hoogly dated Aug. 10, 1908.

John King & Co., a firm of Engineers, purchased a certain land in an execution sale in 1893. The Khal or Nullah in dispute, they claimed as appertaining to the land bought. Prior to this acquisition they and their predecessors in title were lessees of the said land up to khal under a lease dated March 26, 1871 expiring on July 31, 1894 and subsequently extended for a further

* 6th Apr 1914.

period of 15 years. The land in question was a charland settled by the Government under the collectorate of the District of 24 Pergunnahs with one Samuel Smith in 1830 (50)? By divers devolutions and acts of law the said char became vested in one Donald Campbell Mackay on May 8th 1856. The Government of Bengal acquired a part of the said char in 1862. The remaining portion of the char became vested in the appellants. The Southern boundary of the land acquired by the Court of Bengal and the Southern boundary of the land owned by the appellants constituted the whole of the Southern boundary of the char settled with Samuel Smith and called the Telkalghat Road. On March 26, 1895, the Howrah Amta Ry. Co. entered into an agreement under which the former were to transfer to the latter for the purposes of the supply of power and construction of seedings as much of the Khal as lay opposite the appellant's premises. The said Ry. Co., proceeded to fill up the khal and erect offices thereon and to lay down lines with the result that the appellants were dispossessed of land which they now claimed. On June 21, 1906 the appellants instituted a suit in the Court of the Second Subordinate Judge of Hoogly for a declaration of their title and recovery of possession of the khal etc. which decided in their favour, but on appeal to the High Court the Judgment of the lower court was reversed. An appeal was then preferred to the Privy Council.

Ogden Lawrence K. C. and Drucquer for the appellants contended that the High Court had erred in holding that the documents adduced at the trial were insufficient to create title and could not in any sense be regarded as title deeds. They emphasised upon the conduct of the parties and ignored the documentary evidence. The property in the sub-soil of the khal was wrongly held to belong to the state. There were a number of documents which clearly showed that the appellants and their predecessors in title had dealt with the property in dispute as owners. The property in the land on which a drain lay did not belong to the Government but to private owners.

De Gruyther K. C. and Dunne on behalf of the respondents contended that the appellants had not established being in possession of the property within 12 years of their suit. The khal and the land were vested in the Municipal Commissioners of Howrah as owners. The respondents on the other hand had

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been in possession of the Khal and land adversely to the appellants for over twelve years prior to the suit. They therefore could not claim the same.

Lawrence K. C. in reply.

Reference was made to I. L. R. 25 Mad. 635. Bengal Municipal Act 1884 and of 1894 secs. 30 & 22, Bengal Tenancy Act, 1883.

The Judgment of their Lordships was delivered by

Lord Moulton:—This is an appeal in an action brought by John King & Co., Limited, to obtain a declaration of their title to certain lands mainly consisting of a khal, or nullah, along the Telkalghat Road, Howrah, and for ejectment of the defendants therefrom, and for damages or mesne profits.

The course of the case has been rather a singular one. The plaintiffs at the trial proved a clear title to the lands for over fifty years by a succession of duly registered conveyances, mortgages, re-conveyances, and other title deeds, and also proved during that period they leased portions of the lands by leases that themselves were registered. Their Lordships indeed think that they might go so far as to say that, after the rather complex devolution which took place within that long period had been carefully explained by Counsel for the appellants, it became evident that it was scarcely possible to conceive of a clearer title by deeds than that which was proved by the plaintiffs. They also proved that they had not been dispossessed by the defendants until a period well within the period of limitation, and that therefore the Statue of Limitations did not apply.

The Judge at the trial, who went into the evidence with very great care, found in favour of the plaintiffs on all points. An appeal was brought to the High Court. It would seem, from the judgment of the Court, that the judges pronouncing it took a most extraordinary view of the plaintiffs' case, ignored entirely the clear title to the land which the plaintiffs had proved, and expressly held that they came into court without title deeds. They therefore treated the case as though it was one in which the Court had nothing relevant before them but the conduct of the parties to decide which of them was entitled to the land.

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Their Lordships are entirely unable to understand the grounds on which the High Court rejected the title of the plaintiffs have on their title deeds, nor can they understand what the learned judges meant by saying that the plaintiffs have on title deeds. The consequence of this error on the part of the judges of the High Court is that they never considered the real questions in the case, and their judgment gives to their Lordships no assistance.

The title deeds of the plaintiffs (none of which are impugned), which are all duly registered, show that the plaintiffs or their predecessors in title have been, ever since 1855, the owners of a parcel of land bounded on the South by the Telkalghat Road. Now it may very well be that the Telkalghat Road was not at that date the broad metalled road that it is now, but it is certain that it lay to the south of a khal, or nullah, the bed of which, with its banks, is the principal subject in dispute in the present action.

Their Lordships have been asked to interpret this boundary of the property as meaning that the property of the plaintiffs, predecessors in title only went upto the central line of the nullah, which lies to the north of the Telkalghat Road itself. To do that would be to reject the description of the parcels which is to be found consistently in the deeds, and to make these deeds convey land marked out by different metes and bounds from that which there appears. Their Lordships decline so to do. They think that it is possible that by allowing certain portions from time to time to be added to the Telkalghat Road for the purpose of improving that road, the plaintiffs and their predecessors in title may have parted with the property, or at all events with the right of possession of those strips of land; but none of those form part of that which is claimed in this action. So far as that which is claimed in this action is concerned, they have title and they have had possession. They have been dispossessed from this, but they brought this action in due time, and their action of ejectment must succeed, and this appeal must be allowed. Their Lordships are quite satisfied both with the reasons and the conclusions of the judge at the trial, and they will humbly advise His Majesty that the decree of the High Court which is appealed against should be set aside, and that the decree of the Subordinate Judge should be restored and affirmed. The respondents must pay the costs of the

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appeal to the High Court and to the Board.

Solicitors for appellants. *Thomas Cooper & Co.*

Solicitors for Respondents. *Morgan Price & Co.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Present :—Mr. Justice Wallis and Mr. Justice Oldfield.

Adaikka Maistry .. *Appellant.* * (*Plaintiffs.*)

v.

Muthusami Ambalagaran and others ... *Respondents.*

Adaikka Maistry v. Muthusami Ambalagaram

Hindu Law—Alienation by widow of the whole estate consent of the next reversioner—Validity of.

The widow may alienate the whole estate with the consent of the next reversioner.

Debi Prosad Choudhry v. *Golap Bhagat* 1 *Bijoy Gopal Muherji* v. *Girindra Nath Mukerji* 2 distinguished.

Second appeals from the decrees of the District Court of Trichinopoly in A. S. Nos. 93, 94, 97 and 98 of 1911, preferred against the decreed of the Court of the District Munsif of Srirangam in O. S. Nos. 317, 319, 216 and 350 of 1909 respectively.

T. V. Muthukrishna Aiyar for Appellant.

C. S. Venkatachariar for Respondents.

The Court delivered the following

Judgment :—The finding is that the widow has alienated the whole estate and that the next reversioner has consented to the alienation. The rule that the widow may alienate the whole estate with the consent of the next reversioner is not affected by the recent decision of the Calcutta Full Bench *Debi Prosad Chowdhry* v. *Golap Bhagat* [1] or by the recent decision of the Privy Council *Bijoy Gopal Mukerji* v. *Grindra Nath Mukerji* [2] which only deals with partial alienations. The decrees were right and the second appeals are dismissed with costs.

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* 18th April 1914. S. A. No. 211, to 211 4 of 1912.

1. (1913) I. L. R. 40 C. 721 2. (1914) 18 C. W. N. 678 P. C.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Wallis and Mr. Justice Sadasiva Aiyar.

Kumara Venkata Perumal Rajah Bahadur Varu, minor Rajah of Karvetnagar, by guardian Mr. W. A. Varadachariar. *Appellant* in both. (Counter-petitioner).*

v.

Velayuda Reddi and others ... *Respondent in C. M. A. No. 66 of 1912. Petitioner-Plaintiff.*

v.

Saravapalli Subramania Aiyar ... *Respondent in C. M. A. No. 67 of 1912. Petitioner-Decree-holder.*

Kumara Venkata Perumal *v.* Velayuda Reddi.

Civil Procedure Code, Ss. 48, 153—Court of Wards—Estate under management of—No transfer of decrees—Exclusion of time—Power to amend—Defence of limitation taken away—Effect on—Limitation Act—Provisions as to exclusion of time &c.—Applicability of, to period of 12 years under C. P. C., S. 48—Time during which execution was stayed by injunction—Exclusion of.

In reckoning limitation for the execution of a decree, against the holder of an estate, the time during which the estate was under the management of the Court of Wards cannot be deducted where it has not been accompanied by a transfer of the decree to the Collector.

Per *Wallis J:* Except under very special circumstances the Court should not allow amendments when they prejudice the rights of the opposite party as existing at the date of such amendments.

Weldon v. *Neal* (1) followed *Sevugan Chetty* v. *Krishna Iyengar* (2) *Varadiah* v. *Raja Kumara Venkata Perumal* (3) not foll.

Where, accordingly, the Court was asked to treat an application to attach and sell certain properties filed after 12 years from the date of the decree as a petition to amend an earlier application to attach other properties which was in time. *Held*, that the prayer could not be granted as it would deprive the other side of the defence of limitation.

Per *Sadasiva Aiyar, J. (contra):* Having regard to S. 153 of the Civil Procedure Code, Courts have full power to amend the pleadings at any stage so as to advance substantial justice irrespective of whether the other side is or is not deprived of his right to raise technical defences.

In the circumstances of the case, having regard to the fact that the decree-holder was guilty of great negligence in prosecuting his claim, his Lordship declined to grant the prayer for amendment.

Held further: Per *Sadasiva Aiyar, J:* The Civil Procedure Code, is not a special statute but being the general law of procedure passed in the same year as the Limitation Act, the sections of the latter Act relating to exclusion of time (here it was time during which execution was stayed by injunction) govern also the 12 years, period of limitation provided for in S. 48 C. P. C.

Dicta in *Raman* v. *Babu Reddi* (4) dissented from.

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*15th April 1914. A. A. O. Nos. 66 and 67 of 1912.

(1) (1887) 19 Q. B. D. 394 (2) (1911) 22 M. L. J. 139

(3) (1914) 26 M. L.J. 83 (4) (1912) 24 M. L. J. 96

Kumara Venkata Perumal v. Velayuda Reddi. —— Wallis J.

Appeals from the orders of the District Court of North Arcot in E. P. No. 52 of 1910 (O. S. No. 8 of 1890) and E. P. No. 83 of 1910 (O. S. No. 36 of 1890).

L. A. Govindaraghava Iyer and *A. Ramachandra Iyer* for Appellants.

K. C. Desikachariar and *C. V. Ananthakrishna Iyer* for Respondents.

The Court delivered the following

Judgments:—*Wallis J*:—It is admitted by ther espondent that the District Judge's order cannot be supported on the ground that the second period during which the estate was under the management of the Court of Wards should be excluded. During this period of management decrees were not transferred to the collector for execution and the provisions of the Court of Wards Act and the Civil Procedure Code under which time is to be excluded in that case do not apply.

It has however been sought to exclude the operation of the 12 years rule under S. 48, Civil Procedure Code, on other grounds. The decree in the present case was dated the 2nd May 1890. Though a mortgage decree it does not follow the form prescribed by S. 89 of the Transfer of Property Act, but gives the plaintiff a personal decree for the whole amount and not merely for the balance that might be found due after the sale of the mortgaged properties. Accordingly properties of the Judgment-debtor not included in the mortgage were attached and ordered to be sold before the mortgaged properties were brought to sale and it is too late now to dispute the propriety of this order. It is clear therefore that under the terms of the decree limitation began to run under S. 48 (a) from the date of the decree 2nd May, 1890 or at latest under S. 48 (b) from the 2nd of November 1890 after which date the mortgaged property was made liable to be sold. A period of 6 years and 7 months has admittedly to be excluded in respect of the period during which the decree had been transferred to the Collector under the Court of Wards Act, and the respondent seeks to exclude a further period, the further period from 17th August 1907 to the 15th January 1911 during which the estate was under the management of the Court of Wards without any transfer of decrees to the Collector for execution as a period during which in the language of S. 14 of the Limitation Act 1908 he was

prosecuting with due deligence another civil proceeding for the same relief where such proceeding is prosecuted in good faith in a court which from defect of jurisdiction or other cause of a like nature is unable to entertain it. It is not shown that the respondent did anything to prosecute the execution of his decree before any court during the second period of management. If he had applied to the collector to execute it he would at once have been informed that the collector had no jurisdiction as the decree had not been sent to him for execution. I do not think any case is made on the facts for the application of S. 14 of the Limitation Act and it is therefore unnecessary to consider whether the time as limited by S. 48 of the Code of Civil Procedure for the execution of a decree can be extended by virtue of the general provisions of the Limitation Act.

Finally it is said that E. P. No. 139 of 1905 which sought for the sale of properties not included in the mortgage was within time, and we are asked to treat the present petition of 1910 which seeks for the sale of other properties as part of the petition of 1905. Two decisions in *Sevugam Chetty* v. *Krishna Aiyangar.*[1] and *Varadiah*-v. *Raja Kumara Venkata perumal*[2] have been referred to. In the first of these cases the plaintiff sued an agent to recover his account books which were detained by the agent and stated in his plaint that he would bring another suit for the money due by the agent. The Court allowed the plaint to be amended after the money claimed had become barred so as to claim the money also under O. VI, R. 17 of the present Code which allows the court at any stage to amend the pleadings in such manner as may be just. With great respect it does not seem to me to be just to allow a plaintiff by amending his pleadings to revive a barred claim. *Weldon* v. *Neal*[3].

In the second case the decree holder was allowed to amend a petition which asked for the sale of non-mortgaged properties before the sale of the mortgaged properties first and bring the petition in accordance with law. The amendment it is stated in the judgment was allowed to enable the decree-holder to save the bar of the twelve years rule. In the present case we are asked to treat E.P. No. 52 of 1910 which prays for the attachment

1. (1911) 22 M. L, J. 139 2. (1914) 26. M. L. J. 83
3. (1887) 19 Q. B. D 394.

Kumara Venkata Perumal v. Velayuda Reddi.

Wallis, J.

and sale of the defendant's interest in a certain taluq as a continuation of E. P. No. 139 of 1905 in which he sought for sale of the defendants interest in two other taluks. Execution Petition 139 of 1904 is said to have been pending when E. P. No. 52 of 1910. was filed. I do not think it would be right to treat E. P. No. 52 of 1910 as an amendment or a continuation of E. P. No. 139 of 1905 so as to deprive the respondent of the defence of limitation which was open to him against any fresh application claiming this relief. To do so would in my opinion contravene the settled rule of practice laid down by Lord Esher M. R. in *Weldon* v. *Neal* [1] that amendments are not admissible when they prejudice the rights of the opposite party as existing at the date of such amendments. Under very peculiar circumstances Lord Esher says the Court might perhaps have power to allow such amendment, but I do not think there is any case for doing so here.

The appeals are allowed with costs throughout.

Sadasiva Aiyar J:—I am also of the same opinion as my learned brother. Following *Raja of Kalahasti* v. *Varadachariar* [2] I am of opinion that the decree in this case contained both a direction for sale as well as a personal decree and the validity of such a decree, though it is irregular in form according to the Transfer of Property Act, cannot be called in question in execution. The right to attach and bring to sale the properties of the judgment-debtor other than the mortgaged properties arose therefore on 3rd November 1890.

Following the observations in *Phoolas Koonwar* v. *Lalla Jogeshwar Sahoy*. [3] the observations in *Navalchand Nemchand* v. *Amichand Talakchand* [4] and *Moro Sadashiva* v. *Visaji Ragunath*. [5] I am inclined to hold that the Civil Procedure Code is not, a "Special Statute," but it is a general law of procedure usually passed in the same year as the Limitation Act, and that the sections of the Limitation Act relating to exclusion of time and obtaining the benefit of the time spent in certain necessary acts other and similar provisions govern also the 12 years period of limitation provided for in S. 48 of the Civil Procedure Code.

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1. (1887) 19 Q. B. D. 394.
2. (1911) 21 M. L. J. 1036; 3. (1876) I. L. R. I. C. 226 (P.C.) at 242.
4. (1893) I. L. R. 18 B. 734 5. (1891) I. L. R. 16 B. 536.

Kumara Venkata Perumal v. Velayuda Reddi.

Sadasiva Aiyar, J.

With the greatest respect, I find myself unable to agree with some of the observations *contra* in the case in *Rabala Ramana Reddi* v. *Rabala Babu Reddi* [1].

In the present case, the right to proceed against the properties other than the mortgaged properties arose on 3rd November 1890 and deducting for the 6 years and 7 months during which the Court of Wards was in the management under the special provisions of the Court of Wards Act and deducting the 8 months and 12 days during which, according to my view the decree-holder was prohibited by an injunction from conducting execution proceedings the 12 years expired on or about 15-1-10 and the present execution petition No. 83 of 1910 filed on 18-7-1910 is therefore barred by limitation.

Next, there is the contention that this petition of 1910 might be treated as a petition to amend the old petition of 1905 and that such an amendment ought to be granted. I am inclined to give the Courts full power to amend the pleadings at any stage (having regard to S. 153 of the new code) so as to advance substantial justice without much regard to the consideration whether the judgment-debtor or the defendant may not be prejudiced in his right to raise technical pleas. In *Varadiah* v. *Rajah Kumara Venkata Perumal* [2] myself and Spencer J. allowed such an amendment under the circumstances of that case. Mr. L. A. Govindaragava Aiyar quoted against this case in 26 M. L. J. 83, a Judgment of mine as a single judge, in which I expressed an opinion (following cases decided before the new code came into force) that the amendment of an execution petition could not be allowed after it had once been filed. In that earlier case S. 153 of the new Civil Procedure Code was not brought to my notice and as at present advised, I am inclined to give the fullest powers allowing amendments to courts, though, of course the courts must also possess a discretion not to allow such amendments under particular circumstances.

In the present case, I agree with my learned brother that the court's discretion to allow the amendment of the petition of 1905 should not be exercised in 1914 in favour of the decree-holder as he has been guilty of much negligence in not putting in this petition before July 1910.

1. (1912) 24 M. L. J. 96. 2. (1914) 26 M. L. J. 83.

PRIVY COUNCIL.

(On Appeal from the High Court at Madras.)

Present:—Lord Chancellor, Lord Moulton, Lord Parker of Waddington, Sir John Edge and Mr. Ameer Ali.

Mrs. Annie Besant ... *Appellant.**

v.

G. Narayaniah ... *Respondent.*

Annie Besant
v.
Narayaniah

Hindu Law—Father's right of guardianship over infant sons—Revocation of appointment of custody and alteration of scheme of education—Welfare of minors—Jurisdiction of Court having Crown's jurisdiction over infants—Powers of the District Court—Guardians and Wards Act, 1890 S. 9.—Ordinarily resident", meaning of—Powers apart from the Act—Suit not appropriate procedure—Transfer of suit from District Court to High Court Powers of High Courts—Order declaring infants wards and appointing father guardian—Propriety of S. 19—Parties—Infants necessary parties—Issue as to the interest of minors—Mandatory order involving action contrary to law of England—Not to be made.

As in England, so among the Hindus, the father is the natural guardian of his children, during their minority but his guardiansihp is in the nature of a sacred trust and he cannot, therefore, during his life time substitute another person to be guardian in his place. He may in the exercise of his discretion as guardian, entrust the education and custody of his children to another but the authority so conferred is essentially a revocable authority and if the welfare of the children requires it, he can, notwithstanding any contract to the contrary, take such custody and education once more into his own hands. If, however, the authority has been acted on in such a way as in the opinion of the Court exercising the jurisdiction of the Crown over infants to create associations or to give rise to expectations on the part of the infants which it would be undesirable in their interests to disturb or disappoint such court will interfere to prevent its revocation.

Lyons v. *Blenkin* (1) approved.

Where a Hindu father appointed the defendant guardian of the persons of his sons, on the offer of the latter to take charge of them and educate them in England and acquiesced in their departure with her for Europe but subsequently cancelled the arrangement and demanded his children back and on defendant's failure to comply with the same instituted a suit in the District Court of Chingleput for a declaration that he was entitled to the custody and guardianship of his sons and for an order directing the defendant to hand them over to him which was transferred to the High Court under Cl. 13 of the Letters Patent.

Held that the suit was entirely misconceived.

That the plaintiff remained the guardian of his sons notwithstanding that he had affected to substitute the defendant as guardian in his place and that the real questions were whether he was still entitled to exercise the function of guardian and resume the custody of his sons and alter the scheme of education formulated for them and whether the appointment which was a revocable authority could in the events that had happend, be revoked but both these questions could be decided only by the Court exercising the jurisdiction of the Crown over infants having regard to the interests and the welfare of the minors and bearing in mind their parentage and religion and in their presence.

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* 25th May 1914. (1) (1820) Jac. 245, S. C. 37 E. R. 842.

That the District Court had no jurisdiction over infants except such as was conferred by the Guardians and Wards Act, 1890 and as the infants who had left India months previous to the institution of the suit with a view to be educated in England could not be said to be ordinarily resident in the District of Chingleput that Court had no jurisdiction in the matter.

That the powers of High Court in dealing with suits transferred to it from the District Court are confined to powers which but for the transfer might have been exercised by the District Court.

That a suit was not the appropriate procedure.

Held also that a mandatory order directing the defendants to take possession of the infants, bring them to India and hand them over to the plaintiff ought not to have been made as any attempt on the part of the defendant to comply with the order, considering the age of the infants, if they refused to return to India, would have been contrary to the law of England and exposed the defendant to proceedings in *habeas corpus* and no Court ought to make an order which might lead to these consequences, that the most a Court of competent jurisdiction could have directed was to order the defendant to concur with the plaintiff in taking proceedings in England to regain the control and custody of the children.

Held, further, that the order declaring the infants wards of the Court and appointing plaintiff as their guardian which the District Court could not have made in a suit but which it was alleged that the High Court could in its general jurisdiction, make, could not be supported when the infants were not before the Court, and their wishes not consulted and their interests alse were not adequately considered, and in the face of S. 19 of the Guardians and Wards Act which provides that no order declaring a guardian should be made during the life time of the father unless in the opinion of the Court he is unfit to be their guardian.

Appeal from a Judgment and Decree of the High Court, dated Oct. 29, 1913 affirming Judgment and Decree of the same in its Original Civil Jurisdiction, dated April 22,1913.

The facts of the case are sufficiently set forth in their Lordships,' Judgment in 25 Madras Law Journal 661.

When the case came to the Privy Council, in due course the minor sons of the respondent, J. Krishnamurti and J, Nityananda applied and obtained leave to appear by counsel at the hearing as intervenors.

Younger K. C. and Sir Erle Richards, K. C. with them Turnbull for the appellant contended that (1) the District Court alone had jurisdiction in this matter, which could not be widened by transfer to High Court (2) that there was no jurisdiction in the High Court, (3) that if there was any jurisdiction in the High Court no order should have been made declaring the father as guardian, (4) that there was no inherent jurisdiction either in the High Court as there was no property within its jurisdiction

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nor were the infants under it and (5) that no case for the interference of the court was made out on the ground of contract either.

Reference was made to Letters Patent of Supreme Court of 1800, Letters Patent of the High Court, 1862 & 1865 Cl. 13 & 17.

In re Agar-Ellis [1] *Barnardo's case* [2] *Sham Lall* v. *Bindo* [3] *Hope* v. *Hope*.[4] *In re Willoughby* [5] *Sharifa* v. *Munikhan* [6] *Reade* v. *Krishna* [7] *Lyons* v. *Blenkin*.[8]

Kenworthy Brown on behalf of the respondent contended that the High Court had independent jurisdiction which was properly exercised. The question was whether the father or Mrs. Besant was entitled to the guardianship. The appellant obtained the consent of the respondent for the removal of his sons to England by fraud. By Hindu Law the father was the guardian and on facts appearing in evidence *viz.*, subjecting the elder boy to sodomy by Leadbeater and leaving the boy in his custody in spite of protests, he had a right to revoke the arrangement with Mrs. Besant for the guardianship of the minors. It was necessary in the interests of the minors that the father should be allowed to resume the guardianship.

The minors through their counsel *Munro* (with him *Sheldon* and *Ingram*) intimated that they did not desire to go back to the custody of their father.

Younger K. C. in reply

The judgment of their Lordships was delivered by

Lord Parker of Waddington: This is an appeal from an order made by the High Court of Madras in its appellate jurisdiction on the 29th October 1913 confirming with a variation as to costs a decree of Mr. Justice Bakewell in a suit in which G. Narayaniah (the present respondent) was plaintiff, and Annie Besant (the present appellant) was defendant. The decree declared that J. Krishnamurti and J. Nityananda, the sons of the plaintiff, were wards of Court and that the plaintiff was guardian of their persons, and ordered the defendant to hand over the custody of the wards to the plaintiff as such guardian.

1. (1883) 24 Ch. D. 317. 2. (1892) A. C. 332.
3. (1904) I. L. R. 26 A. 594. 4. (1854) 4 De. G.M. & G. 328, 355. S.C. 43 E.R. 584.
5. (1885) 30 Ch. D. 324. 6. (1905) I. L. R. 29 B. 576.
7. (1885) I. L. R. 9 M. 35. 8. (1820) Jac. 245; S. C. 37 E. R. 842.

The facts which gave rise to the action were as follows :— The plaintiff is a Hindu residing at Madras. He is a Brahmin, but is not well off, having an income of some 160*l.* per annum only. He was for many years a member of a society called the Theosophical Society, of which the defendant was President and was well acquainted with her. He had two sons, J. Krishnamurti and J. Nityananda, born respectively on the 11th May 1895 and 30th May 1898. Early in 1910 the defendant offered to take charge of these sons and defray the expense of their maintenance and education in England and at the University of Oxford. The plaintiff thought it desirable to take advantage of the opportunity thus afforded of giving his sons a western education, notwithstanding it would entail a loss of caste. He accordingly accepted the defendant's offer, and by a letter to the defendant, dated the 6th March 1910, effected to appoint the defendant to be guardian of their persons and authorised her to act as such from that time forward.

In their Lordships' opinion the principle on which the legal effect of such a letter falls to be determined does not admit of dispute

There is no difference in this respect between English and Hindu law. As in this country so among the Hindus, the father is the natural guardian of his children during their minorities, but this guardianship is in the nature of a sacred trust, and he cannot therefore during his lifetime substitute another person to be guardian in his place. He may, it is true, in the exercise of his discretion as guardian, entrust the custody and education of his children to another, but the authority he thus confers is essentially a revocable authority, and if the welfare of his children require it, he can, notwithstanding any contract to the contrary, take such custody and education once more into his own hands. If, however, the authority has been acted upon in such a way as, in the opinion of the Court exercising the jurisdiction of the Crown over infants, to create associations or give rise to expectations on the part of the infants which it would be undesirable in their interests to disturb or disappoint, such Court willinterefere to prevent its revocation. *Lyons* v. *Blenkin* [1]

Shortly after the respondent accepted her offer the appellant took charge of the boys and they have since been in her custody

1. (1820) Jac. 245 S. C. 37 E. R. 842.

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and she has defrayed the expense of their maintenance and education. In February 1912 they left India in her company, and after staying with her for sometime in Sicily and Italy finally accompanied her to England, where she left them under the charge of Mrs. Jacob Bright, having made arrangements for their having a course of tuition such as would enable them to enter the University of Oxford.

Though the respondent's confidence in the appellant appears to have been shaken some time previously for reasons to which it is unnecessary to refer, he assented to, or at any rate acquiesced in the departure of his sons in her company for Europe. Nevertheless on the 11th July 1912 he wrote to the appellant a letter cancelling his previous letter of the 6th March 1910, demanding that his sons should be restored to his custody and threatening proceedings if such demand were not complied with. The appellant who had returned to India refused to comply with such demand, and the respondent thereupon commenced a suit in the District Court of Chingleput, in the Madras Presidency, asking to have it declared, that he was entitled to the guardianship and custody of his sons, and that the appellant was not entitled to, or in any case was unfit to be in charge and guardianship of such sons, and for an order on the appellant to hand over such sons to the respondent or such other person as to the Court might seem meet.

In their Lordships' opinion this suit was entirely misconceived. It was not, and indeed could not be disputed that the plaintiff remained the guardian of his children notwithstanding that he had affected to substitute the defendant as guardian in his place. The real question was whether he was still entitled to exercise the functions of guardian and resume the custody of his sons and alter the scheme which had been formulated for their education. Again, it was not and could not be disputed that the letter of the 6th of March 1910 was in the nature of a revocable authority. The real question was whether in the events which had happened the plaintiff was at liberty to revoke it. Both questions fell to be determined having regard to the interests and welfare of the infants, bearing in mind, of course, their parentage and religion, and could only be decided by a Court exercising the jurisdiction of the Crown over infants, and in their presence. The District Court in which the suit was instituted had no

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jurisdiction over the infants except such jurisdiction as was conferred by the Guardians and Wards Act, 1890. By the 9th section of that Act the jurisdiction of the Court is confined to infants ordinarily resident in the District. It is in their Lordships' opinion impossible to hold that infants who had months previously left India with a view to being educated in England and going to the University of Oxford were ordinarily resident in the District of Chingleput. Further a suit *inter partes* is not the form of procedure prescribed by the Act for proceedings in a District Court touching the guardianship of infants. It is true that the suit was subsequently transferred to the High Court under Clause 13 of the Letters Patent 1865, but the powers of the High Court in dealing with suits so transferred would seem to be confined to powers which but for the transfer might have been exercised by the District Court.

Again, the relief asked for was a mandatory order directing the defendant to take possession of the persons of the infants in England, bring them to India, and hand them over to their father. Considering the age of the infants any attempt on the part of the defendant to comply with this order, would, if the infants had refused to return to India, have been contrary to the law of this country, and would have at once exposed the defendant to proceedings in this country on writ of *habeas corpus*. No court ought to make an order which might lead to these consequences. The most which a court of competent jurisdiction in India could do under cricumstances such as existed in the present case, was to order the defendant to concur with the plaintiff as the infants' guardian in taking proceedings in this country to regain the custody and control of his sons.

The difficulties and anomalies of the procedure adopted by the plaintiff are well illustrated by the history of the proceedings. After the transfer to the High Court, issues were settled in the ordinary manner. There was no issue as to whether it was or was not desirable in the interests of the infants, that they should give up all idea of a western university education, and return to India. It was urged that the High Court did in fact consider their interests. If it did so, it must have been upon evidence admitted as relevant on other issues, and it is by no means apparent that, had a proper issue on the point been directed, further evidence would not have been available. At any rate on such an issue, the necessity

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of the infants being properly represented before the Court, and of ascertaining what they themselves desired, could hardly have been overlooked.

At the trial of the action some difficulty appears to have been felt by reason of the facts (1) that the suit was not such as to make the infants wards of Court, and (2) that the elder infant would within a very short time attain his majority according to Hindu law. The Trial Judge sought to overcome those difficulties (1) by declaring the infants wards of Court, and (2) by taking advantage of Section 3 of the Indian Majority Act, 1875, as amended by Section 52 of the Guardians and Wards Act, 1890, and declaring under Section 7 of the latter Act that the plaintiff was their guardian so as to prolong their minorities until they attained respectively the age of 21 years. It was hardly contended that any such order was competent to the District Court in the suit in question. It is alleged, however, that when once the suit had been transferred to the High Court, the High Court had a general jurisdiction over infants which they could exercise at pleasure, and that the directions in question were properly given by virtue of such general jurisdiction. It is to be observed, however, that whatever may have been the jurisdiction of the High Court to declare the infants to be Wards of Court, an order declaring a guardian could only be made if their interests required it, and, as appears above, they were not before the Court; nor were their interests adequately considered. And further, no order declaring a guardian could by reason of the 19th Section of the Guardians and Wards Act, 1890, be made during the respondent's life unless in the opinion of the Court he was unfit to be their guardian, which was clearly not the case.

Since the appeal has been presented the infants have obtained the leave of the Board to intervene therein and be heard by counsel. Counsel on their behalf have appeared before their Lordships' Board and stated that the infants do not desire to return to India or abandon their chance of obtaining an university education in this country. The order of the High Court directing the defendant to take them back to India cannot be lawfully carried out without their consent or without an order from the Court exercising the jurisdiction of the Crown over infants in this country. It is and always was open to the respondent to apply to His Majesty's High Court of Justice in

England for that purpose. If he does so the interests of the infants will be considered and care will be taken to ascertain their own wishes on all material points. Their Lordships do not consider it desirable to express any opinion of their own on questions with which only the High Court in England can deal satisfactorily. It is enough to say that the order made by the Trial Judge in India as varied by the High Court in its appellate jurisdiction cannot stand, and their Lordships will humbly advise His Majesty that the same ought to be discharged, and the suit dismissed with costs both here and in the Courts below, but without prejudice to any application the respondent may think fit to make to the High Court in England touching the guardianship, custody, and maintenance of his children.

Solicitors for Appellant:—*Leigh and Pembertons.*

Solicitors for Respondent:—*Douglas Grant.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Ayling and Mr. Justice Seshagiri Aiyar.

Nachimuthu Chetti ... *Petitioner* (Complainant)*

v.

Muthusami Chetti ... *Accused.*

Criminal Procedure Code S. 250, 1 (2) (b) 45 (c),—Information to the Village Magistrate—Village Magistrate, if Magistrate under the Code.

A person that gives information to the Village Magistrate of an offence which the latter duly transmits to the Police as required by S. 45 (c) of the Criminal Procedure Code is a person that gives information to the Police within the meaning of S. 250 Cr. P. C. and if the information is found to be false or vexatious, the Court may properly order him to pay compensation *Sessions Judge of Tinnevelly Division v. Sivan Chetty* (1) followed.

Per Seshagiri Aiyar J:—Quaere; if the Village Magistrate is not a Magistrate under the Cr. P. Code.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure 1898, praying the High Court to revise the Judgment of the Court of the 1st Class Sub-Divisional Magistrate of Dindigal in Criminal Appeal No. 84 of 1913, confirming the order passed by the Stationary Sub-Magistrate of Palni in calender case No. 630 of 1913.

S. Swaminathan for the Complainant.

Public Prosecutor for the Crown.

(Crl. R. P. No. 621 of 1914.)
(Crl. R. C. No. 71 of 1914.)

1. (1909) I. L. R. 32 M. 258

* 1st May. 1914.

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Ayling J.

The Court made the following order.

Ayling, J:—The petitioner gave information to the Village Magistrate of Ayakudi to the effect that one Muthusami Chetti had stolen a load of cotton belonging to him. The Village Magistrate sent a report to the police under S. 45 (c) Cr. P. C. The police put in a charge sheet under S. 379 of the Indian Penal Code, before the 2nd Class Magistrate of Palni against Muthusami Chetti. The case ended in discharge and the petitioner was ordered to pay compensation under S. 250 of the Cr. P. C.

It is contended that the order is illegal in as much as the case was not instituted by complaint as defined in this Code or upon information given to a Police Officer or to a Magistrate" Vide S. 250 Cr. P. C.

This view is supported by some authority Vide *King Emperor* v. *Thammana Reddi* [1] and also two later cases. *In re Arulanandham* [2] and an unreported case (Criminal Revision case No. 627 of 1913). On the other hand there is a Full Bench decision of this Court in the *Sessions Judge of Tinnevelly Division* v. *Sivan Chetti* [3] which seems to me conclusive on the matter. The first case quoted above was disposed of prior to this decision and with the greatest respect to the learned Judges who decided the second case, they do not seem to us to have given sufficient weight to it.

In the third case the attention of the learned Judge does not appear to have been drawn to it at all. I feel constrained to follow the Full Bench ruling; the more particularly as I feel strongly that the application of the principles therein enunciated to the question for our decision is in accordance with reason and equity, and the true intention of the section.

The question before the Full Bench in the case quoted was whether the complaint or information given to the Village Magistrate constituted the institution of criminal procedings under S. 211 of the Indian Penal Code but the reasoning of *Benson and Munro JJ.* in their Judgment applies with undiminished force to the question before us while the reasoning of the learned dissenting Judge, *Sankaran Nair* J, however applicable in that

1. I. L. R. (1901) 25 M. 667.
2. (1912) 22 M. L. J. 138.
3. I. L. R. (1909) 32 M. 258.

case, has little or no bearing in the present case. I cannot do better than quote from the Judgment of *Benson and Munro JJ.* "He (the injured party) almost invariably gives information, or makes his complaint, to the Village Magistrate, well knowing that the latter will report the information or complaint to the Magistrate or the Station House Officer, or to both, which latter is the regular course in this Presidency. He has, in fact, set the Criminal law in motion just as effectually as if he had gone direct to the Station House Officer, under S. 154 or to the Magistrate under S. 191, for the village headman is bound by law to pass on the information or complaint to those officers. The case would, of course, be different if the imformation or complaint was not a matter which the village headman was bound by law to pass on to the higher constituted authorities. *In the matter of the petition of Jamoona.* [1] In that case it could not be said that the Criminal law was in any way set in motion. But when the information or complaint is one that the village headman is bound by law to pass on, then the language of the Full Bench in the case referred to above, is just as applicable to it as to an information given direct to the Station House Officer or a complaint to the Magistrate."

In other words a man who complains to a Village Magistrate of a bailable offence knowing that the latter must in ordinary course of his duty report the substance of the complaint to the police gives information to the police just as effectively as if he went in person to the police station, "and if the police charge the case, it is a case instituted" on information given to a Police Officer within the meaning of S. 250 of the Cr. P. C. A comparison of the opening words of S. 250 with S. 190, Cr. P. C. will show that they closely correspond and that the former are intended to cover all the three methods marked in S. 190 as (*a*), (*b*) and (*c*) in which a Magistrate may take cognizance of a case, with the single exception of "his own knowledge or suspicion" which would in the nature of things be appropriate to S. 350. I find it difficult to understand why a person who chooses to institute a frivolous or vexatious charge in one way should be less liable to pay compensation than if he instituted it in another seeing that all are equally effective methods of inducing the Criminal Courts to take action.

1. (1881) I. L. R. 6 Cal. 620.

Naghimuthu Chetti v. Muthusami Chetti — Ayling J.

A consideration of the cases relied on by the petitioner will show that both in *King Emperor* v. *Thammana Reddi* [1] and Crl. R. C. No. 627 of 1913, the Court confined itself to the consideration of whether the village headman to whom the complainant went to complain was a "Magistrate" within the meaning of s. 250. The question of whether the information was not, in fact, given to the police was not considered at all. It was, however, decided in the Full Bench case; and it is this decision which in my opinion destroys the authority of *King Emperor* v. *Thammana Reddi* [1] for the proposition that a case of this kind does not come within S. 250. I would dismiss the petition.

Seshagiri Aiyar J:—In this case, the petitioner, complained to the village Magistrate of theft against the accused. The complaint was forwarded to the Police. The Sub-Magistrate before whom the Police charged the accused discharged him and directed the complainant to pay compensation. This order was upheld in appeal. Dr. Swaminadhan contends that S. 250 of the Code of Criminal Procedure cannot apply as there was no—"information given to a police officer or to a Magistrate". I am not satisfied that the term *Magistrate* does not include a village Magistrate. Clause (2) (*b*) of S. 1 only says that the Procedure Code does not apply to heads of villages in the Presidency of Fort St. George. It is true that S. 6. of the Code does not recognise the Court of the village Magistrate: But there is no definition of the term Magistrate; moreover, the High Court exercises jurisdiction over village Magistrates under the Transfer sections by transferring cases from one Magistrate to another; I have therefore doubts whether the term Magistrate in S. 250 does not include a Village Magistrate as well. However that may be, I am satisfied that when the Village Magistrate transmits a complaint to the Police, information is given to the Police officer under S. 250 by the complainant. The object of the complainant was that his complaint should be forwarded to the Police, and it would be straining the language to hold that when he preferred the complaint with this obvious intention he was not giving information to the Police Officer. I see no reason, on principle, why an accused person who goes direct to the Police Officer should be in a worse position than one who achieves the same

1. (1901) I. L. R. 25 M. 667.

Nachimuthu Chetti v. Muthusami Chetti

Seshagiri Aiyar, J.

object by placing his case before a Village Magistrate. With all respect to the learned Judges who decided the case of *In re Arulanandhan* [1] I am unable to agree with their conclusion. The Full Bench ruling of the *Sessions Judge of Tinnevelly Division* v. *Sivan Chetti* [2] is in point. The learned Judges say at pages 262 and 263 "In point of fact in this Presidency the complaint or information to the village—Magistrate is ordinarily the first step in setting the Criminal law in motion. The injured person hardly ever gives information direct to the Station House Officer of Police. He almost invariably gives information, or makes this complaint, to the Village Magistrate, well knowing that the latter will report the information or complaint to the Magistrate or the Station House Officer. The case, would of course, be different if the information or complaint was not a matter which the village head man was bound by law to pass on to the higher constituted authorities."

I agree with this view, and in the conclusion at which my learned colleague has arrived. The petition will be dismissed.

PRIVY COUNCIL.

Present:—Lords Shaw, Moulton and Mr. Ameer Ali.

On Appeal from the Chief Court of Lower Burma.

Ma Nhin Bwin ... *Appellant**

v.

U Shwe Gone ... *Respondent.*

Ma Nhin Bwin v. U Shew Gone.

Budhist Law—Inheritance—Father or sister—Daughters living apart from father and trading on their own account—Policy of the British Government in recognising the Native Laws—Dhammathats—Dhamma—Their authority—Manu Kyay.

Where three sisters had lived apart from their father and carried on trade on their own account and acquired property on the death of two of those sisters, a dispute arose between the father and the surviving sister on the question of succession to the property of the deceased:

Held, after an exhaustive review of all authorities on the Budhist Law, on the authority of later Dhammathats and of Manu Kyay which was compiled in the 18th century during the reign of Alompra and issued under the Royal command in 1756 that the sister was to be preferred to the father under the circumstances to inherit the entire property left by the deceased females.

Held further that it was more in accord with the genius and practice of the extension of the British rule and of the incorporation of various races and populations within the British Empire to accept the native laws in their main elements in so far as they contained a working system of jurisprudence which was in accord with the traditions and habits of the people.

Held also that a decision to be an authority must decide clearly and broadly the point at issue in a subsequent litigation.

* 25th February 1914.

(1) (1912) 22. M. L. J 138. (2) I. L. R. (1909) 32. M. 258.

Ma Nhin Bwin v. U Shwe Gone.

Burge's Colonial and Foreign Law, Prof. Focet-hammer's Treatise on the sources and Development of Burmese Law. MO Gaung's Digest of the Burmese Budhist Law referred to.

The cases of *Mi San Hla Me* (1) *Maung Chit Kywe* (2) *Mah Gun Bo* (3) *Mah E Dock* (4) *and Maung Shwe Bo* (5) *distinguished.*

Appeal from a judgment and Decree of the Chief Court (Lower Burma) dated June 14, 1910 reversing a Judgment and Decree of the same Court in its Original Civil Jurisdiction dated Feb. 16, 1909.

The facts of the case have been sufficiently set forth in their Lordships' judgment.

Coltman and *Houston* for the appellant contended that the lower Court had erred in holding that under Burmese Budhist Law a parent succeeded to the estate of a younger daughter in preference to or to the total exclusion of her elder sister. It was admitted by the father that the appellant was one of the partners in the joint venture for the purchase of Nicobar nuts and therefore the appellant was entitled to the property as a surviving partner. The Burmese Budhist law, as to survivorship was wrongly held to override the ordinary Burmese law of succession in matters of partnership property. The father had forfeited his right to succeed by his conduct. The findings were against the weight of evidence. There was no case which decided the case in point. The Dhammathats of later date like the Dhamma, Manukye, Vernnana, Rajabala and Kyetyo held in favour of sister succeeding to the exclusion of father when they lived apart.

Reference was made to

Purza's case (1874), *Mi San Hla Me's case*,[6] *Maung Chit Kywe* v. *Maung Po*,[7] *Mah Gun Bon* v. *Maung Po Kywe*[8] *Mah B Dock's case*,[9] *Ma Sa Bwin* v. *Mah Thi*[10] *Chan Toons Ceading cases Mah Po Honon* v. *Maung Kan*[11] *Mah Mya* v. *Maung Kywet*[12] Digest of Burmese Budhist Law, Sec. 86, 310-1234, 233 165 and 58. Jardine's Notes on Budhist Law, P. *222*.

1. (Nov. 12, 1894) Printed Judgments (1893-1900) 116.
2. (1895) Leading cases 388.
3. (1898) 11 Upper Burma Rulings, 66
4. (May 18, 1898) 11 Upper Burma Rulings, 109.
5. (Feb. 27, 1899) Printed Judgments (1893-1900) 524.
6. Chan Tons D. Cron Budhist law.
7. P. J. 1890-1200.
8. 11 U. B. R. 66.
9. Chan Tons Leading cases.
10. 11 U. B. R. 111.
11. 11 U. B. R. 157.
12. 11 U. B. R. 228.

Ma Nhin Bwin v. U Show Bwin

De Gruyther K. C. and *Eddis* for the respondent contended that there was no partnership between the three sisters at the time the second sister died; nor was there a gift in favour of the appellant, the surviving sister. According to the Burmese Budhist Law the respondent was the sole heir of his deceased daughters. He was not precluded from succeeding by his conduct or for any other reason. The Dhammathats known as Manu, Vilasa, Kyaw, Nandow, Razathat, and others laid down that father was to succeed to the property of a deceased daughter in perference to her sister.

Reference was made to Sec. 11 of Manu. Essay by Focet-Hammer on Burmese law. Coltman in reply referred to. Secs. 58, 29 and 19 of the Digest of the Burmese Law.

The Judgment of their Lordships was delivered by

Lord Shaw.—This is an Appeal from a Judgment and Decree of the Chief Court of Lower Burma. The Judgment is dated the 14th June 1910, and it reverses a Decree of the same Court in its Original Civil Jurisdiction dated the 16th February 1909. The Appeal is also from an Order dated the 2nd September 1910 which rejected the Appellant's application for a review of the Decree first mentioned.

The question to be afterwards dealt with is one of wide-spread importance, affecting the rights of succession in Burma. It is, however, necessary to state the circumstances, which are few and plain, in such a way as to show the limits of the decision which is about to be pronounced. These will appear as the narrative proceeds.

The Respondent, U Shwe Gone, had three daughters by his first marriage. These were Mah Nhin Bwin, the eldest, Mah Nhin Boo, about two years younger, and Mah Nhim Ghine, about six years her junior. The eldest, Mah Nhin Bwin, is the Appellant in this case. She was born about the year 1865.

These three sisters lived together apart from their father. They traded in cocoanuts in the Municipal Bazaar at Rangoon. This state of matters lasted for many years, and one of the outstanding facts in the case is the complete separation of these ladies from their father, who had married again. They were, in

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fact, independent traders. In later years their business appears to have been of considerable importance. One part of it, for instance, mentioned in the proceedings, is three cargoes of Nicobar nuts, of which one of the ladies was consignee, and the combined value of which amounted to a large sum. In the year 1899, the three sisters bought a house in Rangoon with money derived from the profits of their trading, and they thereafter always lived there together. What were the exact relations in the eye of the law as between these three ladies need not be determined in this case. Whether they were all, or any two of them, in full partnership or in joint adventure with each other does not require to be decided in view of the events of death which happened, and of the opinion on the legal point of succession which is afterwards to be announced.

In May 1905 Mah Nhin Ghine died. Her sister, Mah Nhin Boo, took out Letters of Administration and took possession of her property. Their father, the Respondent, however, made a claim thereto, and threatened proceedings, but nothing further was done. In June 1906 Mah Nhin Boo died of plague. Of the three sisters, the Appellant was thus the sole survivor.

Should it accordingly be determined, as the Respondent contends, that he, being the father of these two deceasing ladies, is entitled by the law of Burma to succeed to their property as their heir in preference to their surviving sister, then the corpus of the estate, whether it originally belonged to the one sister or other, or to both, will go to him. If, on the other hand, so the Appellant, the surviving sister, contends, it be the case that she is entitled as such to succeed as heir to her sisters, then again the entire corpus of the estate of both will pass to her in preference to her father. The point to be determined in this case is, which of those two contentions is correct according to Burmese Buddhist law.

A subsidiary question was raised in the Appeal. It was founded upon allegations of commercial partnership existing between the Appellant and her sister, Mah Nhin Boo. Separate issues, which in appropriate circumstances might come to be of great importance under the law of Burma, were raised as to the rights of a surviving partner, on the one hand in a full partnership, and on the other in a limited partnership or co-adventure.

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These questions have not been lost sight of, but they are superseded by the conclusion to which their Lordships have come as to the right of succession in law by the father on the one hand, or by the sister on the other. The right of succession being determined in favour of the surviving sister carries with it and covers subsidiary rights of partnership as among the sisters *inter se*. No pronouncement accordingly is necessary in regard to the separate case under this head.

A still further question has been argued, and it is well illustrated by the course which the case took in the Courts below. The learned Judge in the Court of First Instance held that by Burmese Buddhist law the Respondent, the father, was entitled to succeed to the estate of his two deceased daughters in preference to the Appellant, their sister. But he also held, however, that the father by his conduct, which in the opinion of the Court amounted to "desertion" and intentional and deliberate neglect "of the ordinary duties of affection and kindred," had forfeited the right of succession which would otherwise have opened to him, and that for this reason the suit, which was to declare such a right of succession, must fail. On this latter point the Appellate Court came to a different conclusion, holding that the Respondent's conduct had not been so grave and reprehensible as to justify forfeiture. Accordingly agreeing as it did with the Court of First Instance, that the father fell to be preferred as the heir entitled to the succession to his daughter's estate, they affirmed that right and gave a decree in his favour. But the Appellate Court, in reaching their conclusion as to the import of the Appellant's conduct, showed very clearly by their Judgment that, so far as actual separation in life of the daughters from their father was concerned, this had been established beyond doubt; and in short it may be taken as a salient fact in the present case that the life lived for years by these ladies was lived as a life separate from and independent of their father.

The need for this fact being pointedly alluded to is that their Lordships are desirous that the present case should not be held as dealing with or affecting parental rights in cases where the family continues to live together. The rights of a parent in Burma in such circumstances appear, according to their traditions and text-books, and to Eastern patriarchal ideas,

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to be of a high order; and they indeed recall to the mind various drastic rules of the earlier Roman Law with regard to the scope of the *patria potestas.* Many illustrations arise in the books, but one may suffice. It is mentioned in even the Manu-Kye, the authority of which is the subject of separate treatment hereafter, that an impoverished parent could sell his children into slavery. These observations are, of course, not made to give any colour to the view that rights to such an extent still remain in modern Burmese Law or Practice, but to indicate that the idea of the powers of a parent in his patriarchal capacity over an undivided household may lead to conclusions which hold no place in rules of succession to the estate of children who have left the father's establishment and become separately settled in life.

On the broad, distinct, and simple issue now to be determined, it might have been thought that the recorded traditions and legal institutes of the country would have been clear. Unfortunately, it is very far from being so. This may no doubt be accounted for to some extent by the fact alluded to by Burge ("Colonial and Foreign Law" I. 60), that litigation was appealed to "when the parties refuse such compromises as may be "suggested by relations and village elders." This salutary practice of compromise has the disadvantage, however, that its results do not enter the records or procure the stamp of authority for a guide in future cases. So far as these results or the decisions of local native tribunals are concerned, they appear to have failed to find a place in the chronicles of the people.

There were, however, as there are still, documents that could be appealed to, all of them authoritative, but varying in the weight of their authority. These are the Dhammathats, usually reckoned as thirty-six in number. They form the expositions of, *inter alia* customs and juridical rules, their dates of issue varying sometimes by many hundreds of years. It is no doubt true that with regard to them a certain evolution can be traced, and it seems by those why have written on the subject also to be admitted that they differ from the ordinary legal institutes in this sense, that a change of dynasty was sometimes accompanied by a fresh composition in the shape of a new, and, it might be, a comprehensive Dhammathat, which, while not removing or

extinguishing its predecessors, appeared upon the scene clothed with the authority of the fresh Government and containing the latest revisal of accepted juridical doctrine. — Ma Nhin Bwin v. U Khew Gone.

It appears to be acknowledged that the laws, or rules, contained in the earlier Dhammathats were in their remotest origin derived from the laws of Manu, which reached Burma by way of Southern India. But with the establishment of Buddhism and the spread of Buddhist doctrine came, in the course of time, the not unnatural desire to strengthen the sanctions of juridical rule by associating its foundations, the Dhammathats themselves, with the religious sentiments of the people, and in the later Dhammathats the commands, precepts, and principles are represented as truly being emanations from the spirit of Buddha himself.

This state of matters must have made the administration of justice still dependent on a comparison of Dhammathat with Dhammathat and a balancing of the weight of their authority. It cannot be said that at the present moment such difficulties have disappeared. Traces of them, indeed, are plain enough in the present case, and one cannot peruse the judgments under review without noting the care with which the learned Judges of Burma address themselves to this task.

There are two views which may be taken. Either the subject is dealt with sufficiently by a single clear or governing authority, or the Dhammathats as a whole must be collated, and judgment determined by the best balance which can be framed as the result of their dicta. The Judges of the Court below have adopted the latter course, and with regard to it their Lordships are not satisfied that even on such a collation the balance has been correctly struck. But the importance of the subject induces their Lordships to put on record how this matter stands according to all the Dhammathats, if the version contained in the Digest of the Burmese Buddhist Law concerning inheritance and marriage, prepared by Mr. U. Gaung, be taken. Mr. Gaung was a member of the Legislative Council of the Lieutenant-Governor, and the Digest was prepared under the authority of the late Judicial Commissioner and is published with the sanction of the Government of Burma.

As showing the variety and conflict of the Dhammathats, reference may be made in particular to Sections 310 and 311 of

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Volume 1 of the Digest of Burmese Buddhist Law on the subject of inheritance. Section 310 refers to "relatives of previous generations who are "not entitled to inherit," and the rule of the Manukye is thus cited.

"The Rule whereby elder relatives are debarred from inheritance is as follows:—The co-heirs live apart from one another; one of them dies without leaving a wife or a husband or a child; his or her estate shall be partitioned among his or her younger brothers and sisters, but not among the elder co-heirs."

The point of the citation is as to the significance of the word "co-heirs" in this passage, and that is illustrated by Section 311, where Mr. Gaung quotes from the Dhammara :—

"The five kinds of co-heirs are the following, namely, one's elder and younger brothers, elder and younger sisters, and their children."

It would thus appear that it was not within the conception of the Manukye on this particular Section 310 to reckon the parent as having a preferred right to the co-heirs. The co-heirs came first, namely, the brothers and sisters of the deceased; and the point of the section is that as among these it was the younger brothers and sisters that were preferred to the elder co-heirs. As stated, the introduction of the parent has to be preferred to brothers and sisters as a class and as a whole is completely negatived.

But their Lordships recognise that the real difficulties of the case—and that the difficulties are real is established not only by the consideration given to the matter by the learned Judges in the present case, but by the course of Burmese decisions to which they refer—arise from the construction of Section 311. That section deals with "relatives" of previous "generations who are entitled to inherit."

The conflict had better be exhaustively set forth, and the forces on either side stand in this way :—

On the side of preferring the parents and ignoring the brothers and sisters, the Dhammathats stand as follows :—

Manu.—"On the death of a person leaving not even a "casually adopted son, his or her parents may inherit."

Various other Dhammathats are cited by Mr. Gaung to the same effect as this extract from Manu.

Vilsa.—"In the absence of descendants the parents are "entitled to inherit."

This is repeated—almost literally—in *Dhammathat Kyaw*, in *Nandaw*, and in *Vannana*.

Razathat.—" If the deceased person leaves no wife, children, " grandchildren, or other descendants, his parents, grandparents, " or other relatives of previous generations are entitled to succeed " to the estate."

To the same effect is the extract from *Varulinga*, namely, " In the absence of sons, including those publicly or casually " adopted, the parents are entitled to inherit."

Finally comes *Kyannet*,—" In the absence of wife and " children, the parents are entitled to inherit the estate of their " son."

It is plain that these extracts do not proceed upon the principle of express exclusion of a right of succession by brothers and sisters. The brothers and sisters are omitted or ignored in the statement of the succession.

On the other side, the same section (Section 311) cites later Dhammathats which give very ample warrant not for ignoring, but for recognising, and for placing in priority to parents, the rights of succession on the part of brothers and sisters. The historical light in which these later Dhammathats should be viewed will be remarked upon later. But meantime this observation may be made. The opinion appears to be entertained that the Burmese Empire was in the 18th Century of the Christian Era one of the greatest Empires of the Eastern world. But it is at least certain that in the middle of that century a strong attempt was made to put the jurisprudence of Burma into a settled and more easily referable form. In the Reign of Alompra, one of his Ministers, a Judge completed a prose Dhammathat, known as the Dhamma, and the citation from the Dhammathats affirmatory of the right of succession on the part of brothers and sisters as in preference to parents becomes thereafter fairly clear.

These citations are as follows.

The Dhamma.—" If a deceased person has neither co-heirs, " nor descendants, his or her parents shall inherit the estate."

It has been already made clear that co-heirs include brothers and sisters, and the exclusion of a right of succession by the parents if such brothers or sisters are alive is thus plain.

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The Manukye.—"The general rule is that relatives of pre-"vious generations shall not inherit the property of their "descendants. But if a person dies leaving neither wife "children, brothers nor sisters, his parents become his sole heirs."

The Vannana has been already cited as ignoring the rights of brothers and sisters in one passage, but in another the situation is expressed thus:—"Failing children, the parents or brothers "and sisters of the deceased are entitled to inherit."

The Rajabala.—"In the absence of husband or wife, child-"ren, and brothers or sisters, the parents are entitled to inherit."

The Manu.—"If children living apart from their parents die "leaving neither heirs nor co-heirs, their parents inherit the "estate."

Cittra.—"In the absence of heirs, parents, grandparents, "or other relatives are entitled to inherit."

Kyetyo.—"In the absence of other relatives, the parents are "entitled to inherit."

It will be subsequently shown that by the use of the phrase, "in the absence of other relatives," is meant simply "in the absence "of brothers and sisters." This would necessarily appear to be so. And it is from this body of authority quite manifest that the right of parents is not only not preferred, but is on the contrary very plainly postponed to the rights of succession on the part of brothers and sisters.

With regard to the Dhammathats as a whole it has to be admitted that the figurative language so frequently employed becomes little helpful in expiscating the idea of inheritance. "It is natural," says *Razathat*, "for sea-water to flow back into the "ocean after entering rivers and streams"; and in another passage, when "lakes are full, the overflow is returned to rivers and "streams, and tidal water always flows back to the ocean." In later centuries the mind of the commentators was still struggling with these figurative expressions; as, for instance, in the *Manu Vannana*: "In the absence of wife and "children, the parents inherit. Why so? Because of the water "which flows into the sea a portion returns up the river." The figure which earlier appears is the simple one of water which cannot find an outlet being borne back to its source; but as

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the Dhammathats develop it is found that the source of the returning water cannot be reached until the intervening inlets and creeks have all been filled up, and there appears to be the conception accordingly, not of at once reaching to the source, namely, the parent without having exhausted the collaterals, namely, the brothers and sisters. These struggles with figurative language appear even in the decisions in recent times in the Courts in Burma, and, as is not obscurely indicated in some of these Judgments, they rather perplex than help the mind.

In their Lordship's opinion the balance of the authority of the Dhammathats is upon the side of the sisters and brothers of the deceased being preferred to the parent. It has been already noted that there is nowhere throughout any of the Dhammathats a specific exclusion of brothers and sisters, and it may further be added that the language of the earliest Dhammathats, where collaterals are, as has been stated, either omitted or ignored, seems not to be analysed or explained or the omission accounted for in the later Dhammathats holding the same view, and the concurrence is a mere repetition. Their Lordships incline to the opinion—and a special reason therefor will be immediately given —that a clearer note is struck by the Dhammathats from the time of the 12th Century of the Burmese, or from about the middle of the 18th Century of the Christian Era. Brothers and sisters as such, co-heirs as such, and relatives as such, are all dealt with and find a place in the discussion, and wherever they appear as a class they appear in the first rank, that is to say, in the rank preferred to parents.

But these views of their Lordships are fortunately confirmed by another and an historical consideration. There can be little doubt that in the middle of the 18th Century of the Christian Era the conquest and subjugation of the country by Alompra was accompanied by a serious attempt by him and his high functionaries of State to place the jurisprudence of the country in a position of fresh and settled authority. One of his Ministers, supposed to be a Judge, issued under the Royal authority one Dhammathat in prose, known briefly as the Dhamma. Another, "in charge of the "Moat of the City of Shwebal," and taken by Dr. Forchhammer to have been Alompra's Minister of War, compiled in prose the Manugye or Manu Kyay Dhammathat, and it is this document last mentioned which was

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issued by Royal authority in 1756, and which obtained the commanding position which it seems to have occupied for a succeeding period of nearly 170 years.

What was the attitude of the British Government in respect to these particulars constituting the foundations of Burmese law? A period of about a century in the case of Lower Burmah and a period of about 130 years in the case of Upper Burmah intervened between the Alompraic code and the British occupation. During this intervening period the Burmese jurisprudence had existed on the footing just described.

It would have been, of course, open to the British Government to adopt the ancient practice of issuing a fresh and authoritative Code. But it was more in accord with the genius and practice of the extension of British rule and of the incorporation of various races and populations within the British Empire to accept the native laws in their main elements in so far as they contained a working system of jurisprudence which was in accord with the traditions and habits of the people. This latter course was adopted. An instance to hand may be cited: In 1892, after the overthrow of King Theebaw and the establishment of settled order in Upper Burma under the British rule, a Circular was issued "for the assistance of the Courts" "in dealing with questions of Buddhist Law." The Circular issued a translation of the Letters Patent in use under the Burmese Government for the appointment of Judges. A list of Dhammathats was appended to it, but, as showing the complexity of the subject, the Judicial Commissioner adds that he "will be glad of information "regarding any copies that may be extent of any of these "Dhammathats other than the more commonly known ones." "After a recital of many resounding titles of the Sovereign, including that of "Mighty Fountain of Justice," the Circular proceeds thus:—

"Now with respect to the office of Judge, it is on this wise: In the Kingdom of which We are the Sovereign Ruler our numerous subjects must not be permitted one to oppress another, and the Judges must admonish and chastise, repress, and judge. In case of dispute they must, in accordance with the Dhammathats, enquire into the causes of the people and decide between them. And for this purpose they are appointed to the Courts as Judges."

This is the general rule, involving as it does that judicial task the difficulty of which has been already mentioned.

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To recur to the Manu Kyay—which for so long had been recognised as the leading guide in the administration of justice, Professor Forchhammer, in his Treatise on the Sources and Development of Burmese Law, thus describes it:—

"This Law Book is written in plain Burmese with very little Pali intermixed. It is not really a Code or a Digest of Law, but rather an encyclopædic record of existing laws and customs and of the rulings preserved in former Dhammathats. Manu Kyay does not attempt to arrange the subject-matter or to explain or reconcile contradictory passages; religious elements are freely introduced; unjust judges shall suffer punishment in Hell with head downwards; a man to whom deposits are made must be a strict performer of his religious duties; a person guilty of perjury will be visited by preternatural punishments."

And having dealt with the development of Burmese jurisprudence and made a division of it into three periods, Dr. Forchhammer concludes thus:—

"The Manu Kyay incorporates the contents of the Law Books of the first and second periods and records laws and customs existing among the people of his time. It deals with the religious laws and usages of the Brahmins and the monastic rules of the Buddhist clergy. It allows the Buddhist element to predominate and draws largely from the Buddhist Scriptures."

It is not seriously disputed that the authority of this text-book, where it is clear, as among the Dhammathats, is of the highest rank. And accordingly, when British rule was extended over Burmese territory, the recommendation to the judicial officers substantially accepted this situation as it was found. In the words of Dr. Forchhammer:—

"The Manu Kyay is to this day the most widely read and studied law book in Burma, and after the British had taken possession of this province the natives pointed to this Dhammathat as containing the body of laws by which they had been governed."

Much has been done during the last thirty years to extend the knowledge of the various Dhammathats; and the labours and encouragement of the Judicial Commissioner, Sir John Jardine, have greatly assisted this extension. The Manu Kyay itself has been textually translated by Dr. Richardson, and is in familiar use as a work of reference; and their Lordships do not understand that the pre-eminent authority of this Dhammathat has been lowered by the labours of other authors or the translation of other Dhammathats.

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On the point in issue in the present case, the Digest of Mr. Gaung represents the dicta of the Manu Kyay thus:—

"The general rule is that relatives of previous generations shall not inherit the property of their descendants. But if a person dies leaving neither wife, children, brothers nor sisters, his parents become his sole heirs."

There does not seem to be any room for ambiguity here. Both classes are dealt with. The one class—wife, children, brothers, and sisters—are specifically and exclusively preferred to the other class, namely, parents.

In the 10th book, chapter 19, of Dr. Richardson's translation, the text reads thus:—

"Though this is the law (that property shall not ascend), why is it also said the father and mother of the deceased have a right to his property? Because if the parents be alive and the deceased has no other relations, they shall inherit his property."

In short, the Manu Kyay is clear that the property cannot ascend to parents unless there be no other relations, and "relations," it should be added, are, as appears clearly from chapters 17, 19, 22 and 25 of the same book, synonymous with brothers and sisters.

Their Lordships do not think it necessary accordingly to pursue the enquiry further. In this Dhammathat, which still remains of the highest authority, the succession of brothers and sisters in preference to parents is established beyond doubt. This being so, the other Dhammathats do not require to be appealed to, to clear up any ambiguity. Were that appeal to be made, it would, in the opinion of their Lordships, as already stated, lead to the same result.

The doubt, however, thrown upon the subject by the judgments of the Courts below can be explained to some extent by a brief glance at the development of authority on the subject.

The sense of the Manu Kyay and the authority of its rule, as above expounded, seem to have been accepted in Burma until the year 1894. On the 12th November of that year there occurred the case of Mi San Hla Me, and the narrative is observable:—

"The two lower Courts have held that according to Buddhist law property cannot ascend where there are collateral heirs, and they have awarded plaintiff's claim. The general rule that property shall not ascend is laid down in the Manu Dhammathat, Book 10, Sections 1, 18, 19, but the rule is not without exceptions."

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(It may be noted that the "Manu Dhammathat" here referred to is simply the Manu Kyay.)

The exception referred to in that case had reference to the separation of one from his adoptive brothers and sisters, and to an adopted son living with his adoptive mother. It is manifest that this so-called exception has nothing to do with the present broad and general case. And it is also clear that the law as above laid down was held to be the general law of Burma.

Thereafter, however, a certain mischance arose by way of what is reported as an *obiter dictum* in the case of *Maung Chit Kywe* in the year 1895. The substantial question in the case is "described as "whether the brothers and sisters of the father of "the deceased, Mah Pean, who was unmarried, have, under the "rules of inheritance in the Dhammathats, a title to the estate "of Mah Pean superior to any title of the defendant as stepfather "living with the deceased." Here it is also quite clear that the "broad and simple question now to be determined was not before the Court. The stepfather was held to have no equitable claim, but in the course of the judgment there occurs this sentence :—

"The Buddhist law is opposed to the ascent of inheritance, but when it cannot go by descent the inheritance is allowed to ascend, first to the father and mother, and failing them, to the first line of collaterals, and in the absence of heirs in that degree, to the grandfather and grandmother and the next line of collaterals."

By "the first line of collaterals" is here meant the line of the father and mother, and it will be observed from this sentence that the true line of collaterals, namely, the sisters and brothers of the deceased themselves, appears to be excluded from the succession, although on each of the higher lines they are included; that is to say, uncles and aunts would be preferred to the grandfather, although brothers and sisters would not be preferred to the father. Whatever may be said of this reasoning, at all events it is probably sufficient to observe that it is not applicable to the question in the present case, and it was not necessary to that decision.

In 1897, however, the case of *Mah Gun Bon* was tried, determining that the estate of a deceased step parent or grandparents go by descent to the stepchildren or grandchildren in preference to collateral relatives by blood. Again it must be observed that the broad and simple question now to be determined was not before the Court. Many citations are made from the

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Dhammathats and, as generally happens, these texts appear to be somewhat inconsistent with each other, but whether they are so in reality or not is difficult to say. After much examination the learned Judge says :—

"From these various authorities and from the other Dhammathats of which there are printed translations, it is clear that, when the ascending line and the descending line fail, the collateral line succeeds, and probably brothers and sisters would be preferred in certain instances to parents."

No indications are given of what this probability is, and it may be sufficient with regard to this authority to say that it does not cover the simple point now to be determined.

The case of *Mah E Dock* (18th May 1898) was referred to. It was a case with reference to adoptive parents. Various texts were cited, concluding with section 211 of the Attathanyepa Vannana, which says:—

"Where there is no younger brother or sister, then the property may revert or ascend to the elder members of the family, such as elder brothers, elder sisters, parents, or grandparents."

And the learned Judge says:—

"Although the last-quoted text throws some doubt on the subject, there seems to be good authority to the rule that parents are entitled to inherit in the absence of direct descendants. There has been no argument on the point."

The "good authority" here referred to appears to have been the cases just cited, and in their Lordships' judgment the case of *Mah E Dock* does not advance the proposition in any respect.

Reference was also made to the case of *Maung Shwe Bo* (27th February 1899) the head-note of which is this :—

"The Buddhist Law is opposed to the ascent of inheritance, but when it cannot go by descent the inheritance is allowed to ascend, first to the father and mother, and, failing them, to the first line of collaterals, and in the absence of heirs in that degree to the grandfather and grandmother and the next line of collaterals."

It is to be noted that "the Respondents in this case were "not represented by Counsel and were unable to afford the Court "any assistance in dealing with the difficult point of law involved." In those circumstances the Judge, perhaps not unnaturally, accepted the *Chit Kywe case* as a guide, and with that their Lordships have already dealt.

It is manifest that the clear and broad issue now to be determined has never been the subject of judicial decision, and that no series of precedents can be relied upon in justification

of the Judgments of the Courts below. Out of respect to the Judges, and in view of the embarrassments produced by the cases cited and by the conflict among the Dhammathats, as well as of the importance of the general question being authoritatively settled, their Lordships have thought it right to make an independent investigation so as, if possible, to clear up the whole question. In the result they are of opinion that the right of the Respondent, the father of the deceased, cannot be maintained as against the right of the Appellant, her sister. — Ma Nhi Bwn v. U Shew Gone.

Their Lordships will accordingly humbly advise His Majesty that the Judgment of the Court below be reversed, and that the suit stand dismissed, the plaintiff-respondent to pay to the appellant the costs of the proceedings here and in the Courts below.

Solicitors for appellant—*Arnold & Son.*

Solicitors for Respondent—*Sanderson, Adkin Lee & Eddis.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Miller and Sadasiva Aiyar.

Matte Sarayya ... *Appellant** (Defendant)

v.

Vepparathi Vydynatham ... *Respondent* (Plaintiff)

Matte Sarayya v. Vepparathi Vydyanatham.

Inam-Temple service—Grant by Government and not by temple authorities—Alienation—Trustees cannot intervene to prevent—Successor in office—May sue to recover.

Where the inam is one granted by the Government to a person doing service in the temple and not one granted by the temple authorities, the latter cannot intervene to prevent alienation though the Government might.

Obiter: if the present servant is removed, the successor in office could recover the inam on the principle of *Pakkiam Pillai* v. *Seetharama Vadhyar* (1)

Second appeal from the decree of the Court of the Subordinate Judge of Cocanada in A. S. 103 of 1911 preferred against the decree of the Court of the District Munsif of Peddapur in O. S. No. 442 of 1909.

V. Ramesam for Appellant.

P.M. Srinivasa Ayengar for *Nagabhushnam* for Respondent.

The Court delivered the following

Judgment:—There is nothing here to suggest that the inam was granted by the temple authorities. Ex. D is the title-deed

S. A. No. 2215 of 1912 *21st April 1914.

1. (1903) 14 M. L. J. 134.

Matto Sarayya v. Vepparathi Vydyanatham.

given by the Government to the person doing service in the temple, and makes the title conditional on the fulfilment of the terms of the grant. There is no ground on which the temple trustees can intervene to prevent the alienation of the inam. No doubt the Government might resume and regrant it if moved to do so, and it may be that if the present servant who is responsible for the alienation were removed from office, her successor in the office could recover the inam on the principle enunciated in *Pakkiam Pillay* v. *Seetharama Vadhyar* [1]. But the trustees cannot recover possession of the land in the present suit and we must reverse the decree of the Subordinate Judge and dismiss the suit. Parties pay their own costs throughout.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Miller and Mr. Justice Sadasiva Aiyar.

Venkatarama Aiyar ... *Appellant** (*Plaintiff*)

v.

Suppa Nadan and others ... *Respondents* (*Defendants 1 to 6*)

Venkatarama Aiyar. v. Suppa Naidu.

Limitation Act IX of 1908, S. 31, Cl. (1)—Mortgage—Date of execution immaterial-Express transfer or express agreement, conferring power of sale unnecessary.

The question whether a document is or is not a mortgage within the meaning of S. 31, Cl. 1 of the Limitation Act does not depend upon the date of its execution and a document which satisfies the requirements of S. 58, Transfer of Property Act is equally a mortgage within the meaning of S. 31 of the Limitation Act whether the document is one executed before or after the Transfer of Property Act.

A document may be a mortgage, though it does not contain an express transfer of interest or an express agreement conferring a power of sale.

Ramabrahman v. *Venkatarasu* (2) followed

Second appeal from the decree of the Court of the District Judge of Trichinopoly in A. S. No. 361 of 1911 preferred against the decree of the Court of the District Munsif of Srirangam in O. S. No. 321 of 1910.

T. R. Venkatrama Sastry for Appellant.

K. V. Krishnasami Aiyar for Respondent.

The Court delivered the following

Judgment:—We think it is open to us to hold that the question whether an instrument is or is not a mortgage within the meaning of S. 31 (1) of the Limitation Act of 1908 does not

1. (1903) 14 M. L. J. 134.

* 21st April 1914.

S. A. No. 2298 of 1912.

2. (1912) 23 M. L. J. 131.

depend on the date of its execution. In *Aliba* v. *Nanu*[1] the view taken by *Muthusami Aiyar J.*, was that the enactment of the Transfer of Property Act created new rights and liabilities in the parties to a mortgage so that what might be a mortgage as defined in S. 58 of that Act, might not be a mortgage if executed before that Act. But this was not decided by the Full Bench in *Rangasami* v. *Muthukumarappa*[2] and is doubted by *Shephard J.* in *Ramachandra Rayagaru* v. *Modhu Padhi* [3]. Though the learned Judge adhered to this opinion in *Rangasami* v. *Muthukumarappa* [2] there he was also of opinion that the document then in question was not a mortgage within the definition of the Transfer of Property Act in the absence of a transfer of property or agreement giving a power of sale. But later cases have decided that to effect a mortgage it is not necessary to have an express transfer of interest or an express agreement whereby the creditor acquires a power to sell the property in default of payment and that an instrument in which these stipulations are not expressed may yet be a mortgage within the definition of S. 58 of the Transfer of Property Act and its holder a mortgagee within S. 31 (1) Limitation Act. (The matter is discussed in *Ramabrahmam* v. *Venkatanarasa Pantulu* [4] in which the cases are referred to. The authority of *Rangasami* v. *Muthukumara* [2] is thus undermined to the extent that we cannot take the definition of a mortgage from it and the Full Bench does not decide that the document before it, though it would have been a simple mortgage if executed after the Transfer of Property Act was not so because it was executed before its enactment.

The document before us was executed before the Transfer of Property Act but it is in our opinion a simple mortgage within the definition of S. 58 of that Act and so it is a mortgage and within the benefit of S. 31 (1) of the Limitation Act.

We reverse the decree of the Court below and remand the suit to the Court of First Instance to be disposed of according to law.

Costs will abide the result.

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1. (1886) I. L. R. 9 M. 218.
2. (1886) I. L. R. 10. M. 509.
3. (1898) I. L. R. 21 M. 326 at 336.
4. (1912) 23 M. L. J. 131.

Kunhanna v. Timmaju.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Sir Charles Arnold White, Chief Justice, and Mr. Justice Seshagiri Aiyar.

Kunhanna Shetty ... *Appellant** (1*st Defendant*)

v.

Timmaju and others ... *Respondents* (*Plaintiffs*).

Aliyasantana law—Ejaman—Deposition of—Grounds—Income of family lands, family property, duty in respect of—Money in the hands of the Ejaman—Presumption of family property—Alienation by Ejaman—Suit by junior members to recover possession—Limitation Act, art. 144,91—*Applicability of.*

Where it was found that the Ejaman of an Aliyasantana family being in possession of funds belonging to the family and a large net income unaccounted for executed a mortgage for the full amount of debt due from the family and it further appeared that in the course of seven or eight years he had twice set up unfounded claims to properties which were found to be family properties and alienated some of them; taking these facts along with the advanced age of the Ejaman and other circumstances though in themselves insufficient to prove dishonesty or incompetence, their Lordships held that though the case was one on the border line, the decree of the lower Court deposing the Ejaman was right and should not be interfered with.

Thammakka v. *Akku* (1) referred to.

The income from family lands is equally family property and it is the duty of the Ejaman, though he may not be liable to render accounts, to devote it to the discharge or reduction of the family debt or to show generally that it was utilised for family purposes.

The presumption of law is that money in the hands of the Ejaman of an Aliyasantana family is family property.

The limitation applicable to a suit brought by the junior members of an Aliyasantana family to recover properties alienated by the Ejaman as property belonging exclusively to himself is art. 144 and not art. 91; the application of the latter article being confined to cases where a person seeks to set aside an alienation effected by himself or by some person acting on his behalf.

The authorities are to the effect that even if the Ejaman purported to act for the family the article applicable is art. 144.

Unni v. *Kunchi Amma* (2) and *Anantan* v. *Sankaran* (3) applied *Swadiveloo Pillai* v. *Ponnammal* (4) distinguished.

Chingacham Vetil Sankaran Nair v. *Chenga Gopal Menon*, (5) *Ganapathi Aiyar* v. *Swamalai Goundan* (6) referred to.

Appeals from the decree of the District Court of South Canara in O. S. No. 9 of 1910.

K. Narayana Rao & H. Balakrishna Rao for appellant in A S. 245/1910 and respondent in A. S. 44/11.

B. Sitarama Rao for respondents in A. S. 245/10 and appellant in A. S. 44/11.

The Court delivered the following

A. No. 245 of 1910. and A. No. 44 of 1911. *21st April, 1914.

1. (1910) I. L. R. 34 M. 481
2. (1890) I. L. R. 14 M. 26.
3. (1890) I. L. R. 14 M. 101.
4. (1912) M. W. N. 883.
5. (1906) I. L. R. 30 M. 18.
6. (1912) I. L. R. 36 M. 575

Kunhanna v. Timmaju.

White, C. J.

Judgment:—*The Chief Justice*:—These are two appeals from a judgment and decree of the District Judge of South Canara. The plaintiffs asked for an order that the 1st defendant should be removed from his ejamanship; they also asked for a decree for possession of certain items of property. (This would be consequential on any order for the removal of the 1st defendant from his ejamanship). The plaintiff also asked that certain alienations of family property which had been made by the 1st defendant should be set aside. The family is a joint Aliyasantana family consisting of the 1st defendant and the plaintiffs. The 1st defendant is the last survivor of his branch of the family. He is now a very old man some 80 years of age. He has been the ejaman of the family since 1900 when he succeeded his elder brother Manjanna Shetty. The learned Judge gave the plaintiffs a decree for the removal of the 1st defendant from the ejamanship; and as consequential on that he gave them a decree for possession of certain family lands, items 1 to 10. As regards other items which were in dispute, items 12, 13, 14 and 15, the learned Judge held that item 14 belonged to the ejaman as his self-acquired property. He held that items 12, 13, and 15 belonged to the family, but that the plaintiffs' right to recover those lands for the family was barred by limitation. Appeal 245 of 1910 is an appeal on behalf of the 1st defendant against so much of the decree as directs his removal from his ejamanship. Appeal 44 of 1911 is an appeal by the plaintiffs on the ground that the learned Judge was wrong in holding that item 14 was the self-acquired property of the 1st defendant and also on the ground that the Judge was wrong with reference to the question of limitation to items 12, 13 and 15.

I take Appeal 245 of 1910 first. As I have stated, the 1st defendant succeeded his brother as ejaman in the year 1900. Within a year or two of his succession to the office he set up a claim to certain properties as the self-acquisition of his branch of the family and a suit was brought in 1901 by the family. It was held that the properties in question were family property. In that suit, however, although the plaintiffs asked for a decree for the removal of the 1st defendant no decree for his removal was given. We thus have a state of things in which for the second time in the course of some seven or eight years a suit has been brought against the ejaman of the family to establish the

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proprietary rights of the family in land which the ejaman has purported to deal with as his own self-acquisition. It is quite true, as pointed out by Mr. Naraina Rau, that the particular items of property which are in question in the present suit were not included amongst the items of property which were claimed by the family when the suit of 1901 was brought and Mr. Naraina Rau has contended that, assuming that these items of property now in question are family property, it is consistent with good faith in the ejaman that he should have purported to deal with them as his self-acquired property. Speaking for myself I should feel some difficulty in acceding to that contention, because I find it difficult to conceive how, having regard to the position of an ejaman of a family such as this and to the means of knowledge which must be at his disposal how he could honestly deal with family property under a *bona fide* belief that it was his self acquired property. However I do not think it is necessary for us to take the view in this case that the ejaman, when he purported to convey these items of property in 1906 under the instrument Exhibit XXXVI was acting dishonestly. For the purposes of this case I will assume that he acted under *bona fide* mistake. Taking that to be so we have at any rate this: that in 1902, he, the ejaman set up a claim to family property which as against the family he was unable to maintain, and that since then, he has dealt with property, which in our view is family property (I deal with this part of the case later) as his own.

There are other matters which we must consider. It became necessary for the family to raise a very substantial sum of money for payment off of a decree debt owing to one Abakke under a mortgage of family property executed in her favour. It is scarcely necessary to observe that if the ejaman was in possession of family funds sufficient to meet that decree it would have been his duty to pay off the decree out of family funds or devote the family funds, so far as practicable or so far as they existed, towards paying off the decree, and not to encumber the family property with unnecessary mortgages. I think it may be taken as established by the evidence that he had in his possession a sum of Rs. 2,108, which might have been applied in reduction of this decree debt. There is evidence that this Rs. 2,108 was family property. I do not say that evidence is conclusive, but the presumption of law is that the money which stood in his hands

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was family property and I think it may be safely said that that presumption has not been rebutted. Then there is evidence that the net profit which he received from the family lands came to a sum of Rs. 2,324 per annum. There is no evidence as to what became of this sum. There is no evidence that it was devoted to purposes of family necessity; and, although I do not suggest that the ejaman was under a liability to render an account for this Rs. 2,324, I think that, if it was family-property as I am prepared to hold it was, it was either his duty to devote it to the discharge or reduction of the family debt or to show generally that it was utilized for family purposes.

Then there are various other matters which the learned Judge discusses. I do not suggest that the separate or cumulative effect of these, if they stood alone, would be sufficient to show dishonesty or even incompetence on the part of the 1st defendant. But taking them in conjunction with what has been proved to have been his conduct with reference to the property which he purported to deal with as his own and with the evidence as to this substantial sum of Rs. 2,324, although I am free to admit that the case is near the border-line. I am not prepared to say that the learned Judge was wrong in his view that the plaintiffs have made out a case for the removal of the first defendant from the ejamanship. I do not know that it is necessary to say anything with reference to the fact that the first defendant is 85 years of age, although it is possibly a matter which one may legitimately take into consideration in considering the case as a whole. We have the fact that although the 1st defendant was present in Court during the hearing of the case, as Mr. Naraina Rau says, he did not go into the box and left the evidence to be given by his son who was I think admittedly managing the property on his behalf. As the 1st defendant did not go into the box, that fact may not unnaturally give rise to the suggestion that he may be—I do not put it higher than that—physically or mentally incompetent to manage this property.

With regard to the authorities cited the only case to which I need refer is that of *Thimmakke* v. *Akku* [1]. In that case, as in this there was something more than unbusinesslike or improvident conduct on the part of the ejaman. In that case

1. (1910) I. L. R. 34 M. 481.

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it was held that the conduct of the ejaman was inconsistent with a due regard to the interests of the family because he had gone into the box to support the alienation which the family impeached and which the courts held was bad as against the family. In one sense the present case may be said to be an *a fortiori* case, because here the ejaman has himself made an alienation of property and the courts have held that the property was not his, but belonged to the family. That, of course, is conduct which it is impossible to reconcile with interests of the family. This being my view with regard to the question raised in this appeal, I think the appeal should be dismissed with costs.

As regards Appeal 44 of 1911, as I said, there are two questions. As regards item 14 I think the appeal fails.

Then there remains the question of limitation. The alienation was made on March 27th 1906, the suit was instituted in August 1909. The learned Judge held that the Article applicable was Article 91. It is argued on behalf of the plaintiffs that the appropriate article is article 144. It is to be observed that this is not a case in which the plaintiff is seeking to set aside an instrument which he has either made himself or which has been made on his behalf. The plaintiffs are asking to have a transaction set aside on the ground that the party who entered in to the transaction was dealing with property which was not his. In other words the plaintiff's case is that this transaction, if void at all, was void from its inception. The authorities are to the effect that even if the 1st defendant in this case had been acting on behalf of the family article 91 would not apply. See *Unni* v. *Kunchi Amma* [1] and *Anantan* v *Sankaran* [2]. With regard to the former of these cases Mr. Naraina Rau, has called our attention to a decision reported in (*Sivavadivaloo Pillai* v. *Ponnammal* [3]) in which the learned Judges declined to follow the decision in *Unni* v. *Kunchi Amma* [1]. They do not say that they distinguish the earlier case; they say they decline to follow it, which, I take it means that in the view of the learned Judges they considered that the decision was wrong. With reference to that case all that I desire to point out is that the case of *Sivavadivelu-Pillai* v. *Ponnammal* [3], as I understand it, was a case in which a minor

1. (1890) I. L. R. 14 M. 26. 2. (1890) I. L. R. 14 M. 101.
3. (1912) M. W. N. 383.

after he came of age was seeking to set aside an instrument which had been executed on his behalf. In the case before us the instrument which the family in effect seek to have set aside was not executed by them or on their behalf. Further, in the Madras Weekly Notes case the contest was not between article 91 but between article 144. and article 44. I may also refer to the case of *Chingacham Vitil Sankaran Nair* v. *Chinga Gopala Menon* [1] and to the recent decision in *Ganapathi Aiyar* v. *Sivamalai Goundan* [2] which seem to proceed upon the principle that where a party seeks to set aside an instrument which he has himself executed or which has been executed on his behalf article 91 applies. The case upon which the learned District Judge relies *Govindsamy Pillai* v. *Ramasawmy Pillai* [3] was a case in which a seller of property sought to set aside an instrument by which he purported to sell property to a purchaser. That was clearly a case where the instrument was impeached by the party who had executed it. The same observation applies to the case of *Singarappa* v. *Talari Sanjivappa* [4]. I think article 144 applies and that the plaintiffs are entitled to recover the lands if the Judge was right in holding that they were acquired out of family funds. As regards that I am not satisfied that the Judge was wrong in his view as to the source from which these properties were acquired. Therefore in my opinion (subject to any charge which may exist in favour of the 4th defendant) the plaintiffs are entitled to a decree for possession of items 12, 13 and 15.

As regards the question of charge I think the matter stands thus. The consideration for the instrument of transfer Exhibit XXXVI consisted in part of items which were binding on the family. In other words when the instrument was executed, there was family necessity for raising money to the extent of Rs. 1569-4-0. The family had the benefit of this Rs. 1569-4-0. That being so, I think the 4th defendant is entitled in equity to say 'I have a charge on these lands, items 12, 13 and 15' to the extent of this amount. The decree will therefore have to be modified as I have indicated and the 4th defendant will be given a charge on items 12, 13 and 15 for the amount of Rs. 1,569-4-0. In this appeal (44 of 1911) there will be no costs for the 4th

1. (1906) I. L.R. 30 M. 18.
2. (1912) I. L. R. 36 M. 575.
3. (1908) I. L.R. 32 M. 72.
4. (1904) I.L.R. 28 M. 349.

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defendant either here or in the court below. The 1st defendant in appeal 44 of 1911 will get his costs on the sum of Rs. 2324. There will be no further order as to costs in this appeal. The interest will be set off as against the mesne profits.

The memorandum of objections is dismissed.

Seshagiri Aiyar, J:—I agree.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Sir Charles Arnold White, Chief Justice and Mr. Justice Oldfield.

Sornammal ... *Appellant.**

v.

The Official Assignee, Madras ... *Respondent.*

Sornammal v. Official Assignee, Madras.

Presidency Insolvency Act Ss. 7, 36, 108—S. 36, a section relating to discovery—Not to be used for adjudicating rights as against strangers—Benami—orders may be made against strangers under S. 7—Applicability of S. 7 to administration proceedings under S. 108.

S. 36 of the Presidency Insolvency Act is a section relating to discovery and cannot be used for adjudicating the rights of the estate as against third parties in respect of properties which stand in their name and *prima facie* belong to them on the ground that they are held benami for the insolvent.

Obiter: Such an order could have been made under S. 7.

Semble: S. 7 is not applicable to proceedings to administer a deceased debtor's estate initiated under S. 108. *Exparte Hama* v. *Walter* (1) followed.

On appeal from the order of the Honourable Mr. Justice Bakewell, dated the 27th day of March 1913 and made in the exercise of the Insolvency Jurisdiction.

Nugent Grant and Subbiah Chetty for Appellant.

D. Chamier and K. Ramnath Shenai instructed by G. A. Duke for Respondent.

The Court delivered the following

Judgments :—*The Chief Justice* :—In this case the South Indian Export Company—I will refer to them hereafter as the company—applied to the Court for an order under S. 108 of the Insolvency Act that the estate of one Muruga Pillai deceased should be administered in insolvency. The application states that the deceased at the time of his death was indebted to the company in the sum of about Rs. 50,000. It also states that by three agreements the deceased had hypothecated skins and other

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* O. S. A. No. 65 of 1913. 2nd April 1914.

I. P. No. 277 of 1911.

1. (1885) L. R. 15 Q. B. D. 159.

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things and also deposited with the company the title-deeds of certain properties to secure the repayment of the amount, due to the company, but that the company were informed that the value of the security held by them did not exceed Rs. 30,000 and they claimed to be unsecured creditors for the balance. An order was made on this application. The order was under S. 109; S. 109, Sub-s. (1) provides: "Upon an order being made for the administration of a deceased debtor's estate under s. 108, the the property of the debtor shall vest in the Official Assignee of the Court, and it shall forthwith proceed to realize and distribute the same in accordance with the provisions of this Act." Sub-section (2) provides: "With the modification hereinafter mentioned, all the provisions of Part III; relating to the administration of the property of an insolvent, shall, so far as the same are applicable, apply to the case of such administration order in like manner as to an order of adjudication under this Act. Shortly after the making of this order, a notice of motion was taken out by the Official Assignee. It was served on two parties; one of them is the widow of the deceased; the other is said to be the brother of the widow. We are not concerned to-day with the transaction in which the brother of the widow is said to have taken part. We are only concerned with the widow. The notice of motion is dated the 4th. December 1912 and it asks for an order as against the widow declaring that certain properties were purchased benami in her name and were in reality the property of the deceased and as such were vested in the Official Assignee. The notice of motion was made returnable on the 9th December 1912. There is appended to the notice of motion this note: "This notice of motion was taken out by the Official Assignee and will be based on his report and oral testimony of witnesses." I do not propose to say anything with regard to the question as to how far the report of the Official Assignee is evidence. We have discussed this question in another case. It may, however, be pointed out that the notice of motion is returnable on the 9th December and the Report is dated the 14th. If the motion had come on for hearing on the day on which it was returnable, it is difficult to see how the widow could have had an opportuninty of meeting the report. However we are told that as a matter of fact the notice of motion did not come on for hearing until February.

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Mr. Chamier who appeared in support of the learned Judge's order contended before us that the application was made on behalf of, and in the interest of, the general body of creditors. The general body of creditors are no doubt interested in seeing that the company's security is upheld. because if the security is upheld, the amount which the company would be entitled to prove against the estate would be so much the less and the balance available to the general body of creditors if there are any assets at all, would be so much the more. That is the only interest, so far as I can see, which the general body of creditors had in the success of the application made by the Official Assignee. On the other hand it is obvious that the Compay had a very substantial interest in the order, which the Official Assignee asked for, being made, because their security was in jeopardy and the order made by the learned Judge was in effect an order that their security was good. The actual finding of the Judge in regard to this matter was. "I am of opinion that the evidence establishes that Sornammal (that is the widow) held the property *benami* for the insolvent." Therefore one cannot help thinking—we have no information one way or the other—that this application at any rate in the first instance, was not conceived as being, as Mr. Chamier suggests it was, in the interest of the creditors but was made for the purpose of establishing by an order of the court in insolvency that the security which the company held over the property of the deceased was a good security on which they could realise.

The state of things, as I understand it, when the notice of motion was launched was this. The Company held a mortgage over the property which constituted them, as they contended, secured creditors. The house property referred to in the notice of motion is included in the mortgage and the mortgage was executed by the deceased and by his widow. The title-deeds stand in the name of the widow. In that state of things I confess I do not understand why the company did not proceed under S. 12 of the Act and if they were not willing to relinquish their security give an estimate of the value of their security, and prove for the balance, and having done so, proceed to realize their security. The widow being a party to the mortgage, the fact the title-deeds stood in her name would not have been, as I understand the case, an obstacle in the way of the Company when they

sought to realize the security. If the Company had sought to realize their security, it would no doubt have been open to the widow to set up a case that her signature to the mortgage was obtained by fraud; but until she was able to substantiate that the Company were in the position of ordinary secured creditors and were entitled to realize their security. However, that course was not taken. When the motion came on for hearing, Mr. Grant, who appeared for the widow, did not argue the case on merits; but he said there was no jurisdiction to make this order. So far as the notice of motion goes, it does not appear under what section of the Act the jurisdiction of the court was invoked. But I do not think it is contended that, as a matter of fact, the court was asked to make the order under any other section than S. 36. The learned Judge in his Judgment refers to that section. He says that under S. 36 the Official Assignee can apply to the court in a summary manner for an order that the property may be delivered to him. Then the learned Judge goes on to refer to S. 7.

As regards S. 36 our view of that Section, as we have had occasion before to observe, is that it is a discovery section. It enables the Official Assignee to get an order which will help him in discovering the existence of property which belongs to the insolvent, or which will enable him to acquire information on which, on adopting the appropriate procedure, he may be in a position to ask the Court for an order that property which *prima facie,* belongs to some body else forms part of the estate of the insolvent. In my view the section does not authorise the Court to make an order determining any question of title as between the insolvent and a third party where a third party sets up a title which the Official Assignee desires to call in question. Other Sections of the Act provide for the procedure whereby these questions of title are to be determined. We have specific Sections, such as the voluntary settlement Section and the fraudulent preference Section, and in addition there is the general power of the Court to set aside a transaction, if a proper application is made in that behalf, on the ground that it is fraudulent, or against the policy of the Insolvency Act. That being my view of the construction of the Section—and I think that is the construction which has been placed upon the corresponding English Section, namely, Section 27 of the English Act

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of 1883—the learned Judge in my opinion, had no power to make the order under S. 36.

Then Mr. Shenai has contended on behalf of the Official Assignee that the learned Judge had jurisdiction to make the order under S. 7. Now S. 7 is taken word for word from s. 102 of the English Act. As regards S. 7 it seems to me that three questions arise. First, does S. 7 apply to administration proceedings at all? Secondly, if it does, the general question is, is there power to deal with a question arising between the Official Assignee and a stranger, where the Official Assignee sets up no larger rights than the insolvent had, on motion in the insolvency? Thirdly, if s. 7 applies, the specific question, was there jurisdiction to make this particular order in view of the circumstances in which it was made?

Now as regards the first question, does S. 7 apply to administration proceedings at all? The provisions of S. 125 of the English Act are reproduced in Ss. 108 and 109 of the Indian Act Sub-ss. (1) and (2) of s. 109 of the Indian Act correspond to Sub-secs. 5 & 6 S. 125 of the English Act. In the case of *In Re. Hewitt: Ex parte Hannah and Walter Hewitt* [1] the question arose as to whether the provisions of S. 27 of the English Act of 1883, which corresponds to S. 36 of our Act applied to the administration of the estate of a person dying insolvent and it was held that they did not. The *ratio decidendi* of that case was that as S. 27 was not one of the provisions of Part III of the English Act that particular section was not applicable in the administration of the estate of a deceased insolvent. *Mr. Justice Cave* puts it thus:—" This question depends primarily on the language of S. 125. The 6th sub-section of that section" (that is Sub-S. (2) of S. 109 of our Act) " applies with the modifications after mentioned all the provisions of Part III of the Act......relating to the administration of the property of a bankrupt so far as the same are applicable. There is, therefore, an express enactment that the provisions of Part III with certain modifications shall apply to the administration in bankruptcy of the estate of a person dying insolvent. The terms of sub-sec. 5 (that is sub-sec. (1) of our S 109) " cannot, as it seems to me, be relied upon as extending the

1. (1885) L. R. 15 Q. B. D. 159.

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provisions of Sub-section 6," Mr. Justice Wills says:—"By Sub-S. 6 of S. 125, the legislature has specifically pointed out certain Sections of the Bankruptcy Act which are to be applied to the administration of the estates of persons dying insolvent. According to the ordinary rule of interpretation, unless there are strong reasons to the contrary, when they provide that the provisions of Part III shall be applicable, they must be considered to mean that other parts of the Act shall not be applicable. The learned Judge also observes:—"There is no reason afforded by the use of the language referred to why any other provisions than those of Part III should be applicable to the administration of estates under S. 125." If we apply the *ratio decidendi* of that decision to the question before us, there can only be one answer to the question. There is another authority which throws light on the question and that is *In re Gould* [1]. There it was held that S. 47 of the Bankruptcy Act of 1883, which avoids certain voluntary settlements executed by a bankrupt, does not apply to the administration of the estate of a deceased insolvent by the Court of Bankruptcy. According to the English decisions the fact that the provision which is sought to be applied to administration proceedings does not form part of Part III is conclusive on the question as to whether that provision is applicable. On the other hand the fact that it *does* form part III is not conclusive. The Judgment of Fry L. J. is instructive, because he traces the history of the jurisdiction. There he makes this observation: "It is argued that the use of the words 'administration according to the law of bankruptcy' in sub-sec. 1, shows that the estate of the deceased debtor, is to include the property of third persons. In my Judgment those words apply only to the mode of administration, and not to the subject matter which is to be administered. In my opinion, if it had been intended to arm the Court with the power of administering the property of third persons as part of the estate of a deceased insolvent debtor—a power which had never been possessed by the Court of Chancery—the legislature would have expressed their intention in clear and unambiguous language". Again "What is an 'administration order'? It is 'an order for the administration of the deceased debtor's estate' and of nothing else. So many therefore, of the

1. (1887) L. R. 19 Q. B. D. 92.

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provisions of Part III as are applicable to such an administration are imported into S. 125 and no others." I do not think there is any case (at any rate our attention has not been called to any case in which it has been held that on a motion in proceedings for the administration of the estate of a deceased insolvent, the Court has power to hold that property which *prima facie* belongs to somebody else forms part of the estate of the insolvent. For the purposes of the case before us to-day, I do not think it is necessary for us to express any final opinion in this matter. But I find it difficult to suggest any grounds for holding that the decision in *In Re Hewitt* [1] does not govern the question.

Assuming for the purposes of this Judgment that S. 7 applies to administration proceedings, there is the further general question, is there power to deal with this class of cases on notice of motion? That of course depends upon the construction of S. 7 which is taken word for word from S. 102 of the English Act. No doubt the words are very wide "Subject to the provisions of this Act the Court shall have full power to decide all questions of priorities, and all other questions whatsoever, whether of law or fact, which may arise in any case of insolvency coming within the cognizance of the Court, or which the Court may deem expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case," that is to say, in any case of insolvency coming within the cognizance of the Court.

The effect of S. 102, of the English Act has been the subject of a great many decisions which I do not propose to discuss now. But the effect of the decisions is thus stated by *Vaughan Williams, L. J.* in his book on Bankruptcy—9th edition page 342. He points out various considerations and then goes on." "All" (that is all the considerations) " seem to point to an intention by the legislature that the High Court in Bankruptcy should now exercise that jurisdiction between the trustee and strangers which the cases under the old Act decided that the Court of Bankruptcy as then constituted, could not, or, ought not, to exercise." Applying that summary of the law I should have been disposed

1. (1885) L. R. 15 Q. B. D. 159.

to hold, although I do not think it necessary to give a final decision on the question, that the question which was raised in this notice of motion was a question which could be determined as between the Official Assignee and the stranger on a notice of motion, and that it was not necessary that the Official Assignee should bring a suit for the purpose of having the question determined.

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That brings me to the last question, the specific question in view of the fact that the learned Judge purported to make the order under S. 36, can we say that he had jurisdiction to make the order? The learned Judge says, "Under S. 36 the Official Assignee can apply to the Court in a summary manner for an order that the property may be delivered to him." He refers to S. 7 as giving him power to decide all questions arising in a case of insolvency. I understand that the learned Judge decided the question of title and ordered delivery of possession in exercise of the powers which he considered he possessed under S. 36. As I have already said, in my opinion the jurisdiction given by S. 36 does not include a power to determine questions of title as between the Official Assignee and a stranger to the insolvency, where *prima facie* and until the contrary is proved (and this is the footing on which this case was argued) the title is in the stranger.

I think we must hold that this order was made without jurisdiction. The order in so far as it relates to the properties described as items 1 and 2 in the schedule attached to the notice of motion is set aside with costs here and before Mr Justice Bakewell, the costs to be taxed on the Original Side Scale. The costs of Mr Grant's client and of the Official Assignee may be paid out of the estate.

Oldfield J:—I agree.

The Perfect Pottery Company Ltd. v. Ida L. Rose.

PRIVY COUNCIL.

Present:—Lords Moulton and Parker of Waddington, Sir John Edge and Mr. Ameer Ali.

(On appeal from the Court of the Judicial Commissioner, Central Provinces.)

The Perfect Pottery Company Ltd. ... *Appellants.*

v.

Ida L. Rose ... *Respondent.*

Company—Offer of Service and Sale of patent prior to formation—Minutes of the Company—Proviso—Sale of Shares.

Where one Rose who had invented a tile called "Perfect tile" offered his services as well as his patent to the provisional directors of the Perfect Pottery Co." which on being duly formed accepted the offer by a certain minute of Oct. 15th 1905 agreeing to pay Rs. 30,000 for the Patent, Rs. 10,000 paid in cash and Rs. 20,000 in Shares, with the proviso that absolute property therein should vest in Rose in the fifth year and Rose having died before the expiration of the fourth year the Company refused to allot finally the said shares to Rose's widow.

Held, that the only contract between Rose and the Company was that contained in the minutes of Oct, 15th and that the offer by Rose could be incorporated into the minute only to the extent it was not inconsistent with the minute, and that the clause in the offer enabling the Company to cancel and retain shares, which was inconsistent with the minute of the Company by which there was a sale of the Patent for Rs 30,000/-, was of no effect.

Appeal from a Judgment and Decree of the Court of the Judicial Commissioner dated Nov. 18, 1910 affirming a Judgment and Decree of the District Judge of Jubbulpore dated June 17, 1910.

One Rose had invented a tile which was Patented as "Perfect tile." He offered the Patent as well as his service to the provisional directors of the Perfect Pottery Co. The Company was duly formed. By its minutes dated October. 15th 1905 the Company agreed to pay Rs. 30,000—for the patent Rs. 10,000—in cash & Rs. 20,000—in shares with the proviso that property therein would vest in Rose in the fifth year of the issue of the shares but he to receive dividends thereon in the meantime.

Rose died before the expiration of the fourth year of the existence of the company. His widow claimed the shares, but the company refused to consider her claim on the ground that by virtue of the letter written by Rose to the provisional directors it had the power to cancel and retain the said shares in certain events, Rose's death being one of such events. The District

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Judge decided in favour of Mrs. Rose with costs. On appeal the decree of the lower court was varied to the extent of the costs, Mrs. Rose being deprived of her costs in both courts. The Company appealed to His Majesty in Council.

Sir Robert Finaly K.C. with him *Loundes* for the appellants contended that it was clear that Rose entered the service of the Company upon the terms recorded in his letter of offer, under which shares claimed were not to become the property of Rose, when he had remained in the service of the company only for four years. The minute of the company was not intended to constitute or record any other contract than what was embodied in Rose's letter. The minutes were not inconsistent with existence of the contract between parties on the terms recorded in the said letter. No contract to issue the shares claimed without payment in cash having been filed with the Registrar under Sec. 28 of the Indian Companies Act October 1882, the respondent was not entitled to claim them without payment in full.

Reference was made to *Birchin* v. *Shaw* [1]

Spence and O'Gilvie appeared for the respondent, but were not called on.

The judgment of their Lordships was delivered by

Lord Parker of Waddington: In this case their Lordships are of opinion that the only contract between Mr. Rose and the Company was that contained in the minute of the 15th October 1905. The question which their Lordships have to decide is how far this minute incorporates the terms of the document which has been referred to as D 1?. It is to be observed that so far as it contains any express terms, those terms differ form those contained in D 1. The most, therefore, that can be argued, is that D 1 is incorporated, except so far as it is inconsistent with the express terms of the minute.

Now one of the express terms is, that there is a sale of the Patent for Rs. 30,000 to be paid partly in cash and partly in paid-up shares, and in their Lordships' opinion, the clause contained in D 1, which enables the Company to retain and cancel these shares in certain events is inconsistent with there being such a sale.

For these reasons their Lordships think that the decision of the Court below was correct. In their opinion the plaintiff is

1. (1867) L. R. A. C. 10, 15.

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entitled, in the events which have happened, to have shares to the amount of Rs. 20,000 allotted as fully paid.

With regard to the suggestion which has been put forward that shares have already been allotted which are not fully paid, their Lordshis need not express any opinion.

Their Lordships will humbly advice His Majesty to dismiss this appeal with costs.

Their Lordships think there was no sufficient reason for depriving the respondent of her costs in the two Courts below. Therefore, the decree of the Court of Judicial Commissioner will be varied to the extent of giving her these costs.

Solicitors for appellants:—*T. L. Wilson & Co.*

Solicitors for respondent :—*Bull & Bull.*

PRIVY COUNCIL.

Present :—Lords Moulton and Parker of Waddington, Sir John Edge and Mr. Ameer Ali.

On Appeal from the High Court at Calcutta.

Nalini Kanta Lahiri ... *Appellant* *

v.

Sarnamoyi Debya and others ... *Respondents.*

Nalini Kanta Lahiri v. Sarnamoyi Debya and others

Partition suit—Judicial—decree — Parties—Knowledge of one without being a party—Acquiescence—Sec. 244 of Civil Procedure Code of 1882.

Where partitions had taken place of a patni talook and the last of the co-sharers brought a suit to claim his proper share stating that the various partitions had the effect of awarding the other co-sharers more than their proper shares, at his expense.

Held, that the partitions being by judicial decrees made against him the matter was res Judicata in as much as in all partition suits one co-sharer who desires partition has to make other co-sharers defendants and the award is to be made by a judicial decree and the award so made could only be rectified under the provisions of the Civil Procedure Code and that no irregularity being pointed out it was res judicata also as between co-defendants.

Appeal from a Judgment and decree of the High Court dated July 3·1906 affirming a Judgment and Decree of the subordinate Judge of Patna and Bogra dated September 22, 1902.

A patni Talook, Taraf Udoi Krishnapur belonged to the descendants of one Ikali Charan Sanyal. Suits were brought by them to have the talook divided in proportion to their respective shares. In one of the suits the respondent applied to be made a defendant while in this as well as in another the appellant was

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* 23rd April 1914.

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one of the defendants. It was alleged that the appellant was aware of all the suits. The appellant in the present suit alleged that the other co-sharers received through the Courts more than what they were entitled to and he brought the present suit in order to recover his proper share. The defence was that the partitions operated as res judicata and the possession of the defendant over the excess ripened into full ownership by virtue of S. 23 of the Indian Limitation Act of 1877. The Subordinate Judge dismissed the plaintiff's (appellant's) claim. The findings, on appeal, were confirmed by the High Court. An appeal to His Majesty in Council was then preferred.

De Gruyther K. C. and *Ross K. C.* for the appellant contended that the judgment proceeded on the basis that the appellant was entitled to half the property.

[*Lord Moulton*: You say it is a self contradictory decree] In one partition suit the defendant did not appeal, but in the other he received no notice. [*Lord Moulton, res judicata* is in the nature of estoppel; there may be estoppel against estoppel.] Art. 142 of the Indian Limitation Act of 1877, applied while the respndents said that Art, 121 of the Indian Limitation Act of 1877 applied [*Lord Moulton* ; If he did not bring a suit to rectify the error then art, 44 applies].

[*Lord Moulton*: there is an effective Judgment in a partition suit]. All the co-sharers received their shares, excepting the appellant. The whole point was whether it was decreed in the presence of the appellant. The question was never at issue as S. 13 of the Civil Procedure of 1882 required. By explanation II it ought to have been raised. The matter therefore was not *res judicata*.

Reference was made to *Sheikh Khurshed* v. *Fatima* [1].

Dube appeared for the respondents but was not called on.

The judgment of their Lordships was delivered by

Lord Moulton. In this case the original plaintiff (now represented by the appellants) was one of the co-sharers of a *Putnitalook.* In past times, others of the co-sharers have been desirous to have their shares partitioned out to them, and have accordingly

1. (1878) I. L. R 3 cal 551,

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brought suits for that purpose. To every one of those numerous suits the appellant was a party, and the object of each of those suits was to have the share of the plaintiff in the suit partitioned out by metes and bounds. Those suits have gone on until every co-sharer other than the plaintiff has had his share thus partitioned out, so that the plaintiff was left with the remainder as representing his share. In this suit he alleged that this remainder was insufficient to represent his share of the original *Putni-talook*. It is evident that on examination of the claims of previous plaintiffs, he had convinced himself, and, so far as their Lordships know, convinced himself correctly, that in two cases the shares ascribed to other co-sharers were larger than those to which they were entitled, and, that, accordingly, the partition gave them a larger share of the property than it ought to have done.

It is immaterial, in the opinion of their Lordships, whether this view which is put forward by the plaintiff in his plaint is correct or not, but their Lordships will assume for the purpose of this judgment that it is correct. The object of the present suit is to correct the apportionment to those of the previous plaintiffs, or co-sharers, who received more than their proper share so that the remainder will properly represent the plaintiff's share.

The Courts below have held that this suit cannot be sustained both on the ground of *res judicata* and on the ground of limitation. Their Lordships do not find it necessary to deal with the question of limitation, which was dealt with by both the Courts below, because they are of opinion that the plea of *res judicata* is a sufficient answer to the suit.

The case viewed from this point of view is an extremely simple one. If any co-sharer applies for a partition of a property he must make the other co-sharers defendants, because the partition which is made in his favour is a partition against his co-sharers. That which gives him a portion of the property takes away all right which they would otherwise have to that portion, and therefore it is a decree against them, and in favour of himself.

In the present case two groups of suits are referred to. The first comprises suits 25 of 1885, and 75 of 1885, and suit 5 of 1886. These suits were heard together, and culminated in a

decree which was a decree made in the three suits. It declared the shares of all those who in those suits sought partition. Commissioner was directed to go on the ground and to measure out the declared shares of those parties. That was done, and they were put into possession of these shares.

The decree was thus made in a partition suit in which the plaintiff was a defendant. It was therefore a decree against him in a suit to which he was a party. That being so their Lordships have no hesitation in saying that it became thereby *res judicata*, so far as he was concerned. Supposing any error was made in the partitioning out, his remedy lay in proceedings in that suit suitable to correct that error; and the Code of Civil Procedure provides adequate means for the correction of such error. But apart from such proceedings (none of which were taken by him) it is in their Lordships' opinion the clearest possible example of *res judicata*, a judicial decree made against a party in a suit in which he is defendant.

Mr. Ross has attempted to draw a distinction between the partitions under this group of suits and that in the other suit to which exception is taken by the plaintiff, *viz.*, No. 231 of 1892. In that case a lady, who was not originally made a defendant, applied to be made a defendant, claiming that a certain portion of the share of her husband (who was a defendant to the action) was now possessed by her, and she was accordingly made a defendant. In such partition suits a defendant has a right to have his share also partitioned out, and she applied and her share was partitioned out. Mr. Ross has been unable to point out any irregularity in the procedure in that suit. He pointed out, with perfect justice, that in the plaint his client says that he was ignorant of her being made a party, and intimates that he was ignorant also of her having obtained a partition. But he admits that his client, must have known of the decree for partition, and certainly he knew that he was interested in the partitioning actually being carried out in that suit. But it is not necessary to enter into these matters. It suffices for the present judgment to say that no irregularity of any kind has been pointed out by the counsel for the appellants in that suit, and the consequence is that there is nothing to distinguish it from the previous cases with which their Lordships have already dealt.

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Their Lordships are therefore of opinion that the action of the plaintiff is barred by the plea of *res judicata*, and accordingly they humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitors for appellant :—*W. W. Box & Co.*

Solicitors for respondents :—*Barrow, Rogers & Neville.*

PRIVY COUNCIL.

Present .—Lords Dunedin and Moulton, Sir John Edge, and Mr. Ameer Ali.

On appeal from the High Court at Calcutta.

Harendra Lal Roy Chowdhuri v. Srimati Hari Dasi Debi.

Harendra Lal Roy Chowdhuri ... *Appellant.*

v.

Srimati Hari Dasi Debi and others ... *Respondents.*

Registration—False entry of property in a mortgage—Inclusion to obtain jurisdiction of the Calcutta office of Registry and the Calcutta High Court—Fraud on Registration law—Suit on mortgage decree for rectification—Property of Territorial jurisdiction—Erroneous decision upon, cannot enlarge jurisdiction Practice-Concurrent finding—No evidence to support—Court of law—Description of house property —Number and street—Primary description.

Where property described as No. 25, Gurudas street Calcutta within certain boundaries was included in a mortgage of properties situate in the mofussil and it was found that there was no such property as No. 25 Gurudas street and that the property situate within the given boundaries at no time belonged to the mortgagor but the High Court in a suit upon the mortgage to which the contesting defendants were not parties had held that the insertion of No 25 Gurudas Street was a mistake for No. 25 Ashutosh lane (which also belonged to others) and as such had jurisdicion and had given a decree on the mortgage at the same time directing however, an amendment of the description of the property given in the mortgage.

Held, that the case was not one for rectification at all and even if otherwise, the court could not order rectification when there was no prayer for the purpose and the question was not properly before the court.

That an erroneous decision by the court that it had jurisdiction could not enlarge its limited territorial jurisdiction so as to bind persons who were not parties to the suit.

That the case might be viewed either as one in which non-existent propertyhad been mortgagedor, as one in which the parties had made a fictitious entry in order to give the deed the appearance of relating to property situate in Calcutta and therefore within the jurisdiction of the Calcutta Sub-Registrar and the Calcutta High Court; in either view both the registration and the decree were wholly without jurisdiction and invalid.

An entry intentionally made use of by the parties for the purpose of obtaining registration in a district where no part of the property actually exists is a fraud on the registration law and no registration obtained by that means is valid. The same considerations apply to the jurisdiction of the Court in respect of the deed and such fictitious item is totally ineffective to bring the deed within the jurisdiction of the court which would not have had jurisdiction but for such entry.

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The proper description of houses in towns for the purpose of registration is by the street in which they are situated and the number which they bear in that street and that is the description to which one should primarily look in identifying the property.

Held also, that the principle of concurrent finding did not apply to the finding of the lower courts that the entry was due to a mistake as there was no evidence to support the finding.

Appeal from a Judgment and Decree of the High Court, dated March 3, 1909 reversing a Judgment and Decree of the Subordinate Judge of Midnapore, dated May 31, 1906.

The facts of the case relevant to the decision of the Board are sufficiently set forth in their Lordships Judgment.

De Gruyther, K. C. with him *O' Gorman* for the appellant contended that the decree obtained by the appellant was a real charge. It must be treated as decree for money; under ordinary sale, a purchaser took the interest of the original debtor. The existence of money decree did not affect title; any attachment might be executed and other creditors might come in under the distribution clause. There was no priority in attachment; after decree it became a real charge.

Reference was made to Ss. 254, 266, 274, 284, 295, 252 of Act XIV of 1882, C. P. Code.

Bazayet Hosain v. *Duli Chand* [1], *Radhu* v. *Mahesh* [2].

Upjohn, K. C, and Dunne for the respondents contended that as to the mortgage deed in question there was no registration and as to the decree of the High Court it was no decree; certain property which gave jurisdiction to the Registry in Calcutta did not exist nor did it belong to the mortgagor. The High Court in its ordinary original jurisdiction could not try cases in respect of properties situated outside Calcutta. Could he policy underlying registration be defeated by sticking in some property with which the mortgagor had nothing to do? It was all right if the parties honestly intended to deal with the property. The effect was that the appellant did not fulfil statutory requirements for registration.

De Gruyther in reply argued that the object of registration was to give notice of and publicity to the transfer of property.

He referred to Ss. 21, 64, 65 and 51 of the Registration Act of 1877.

1. (1878) L. R. 5 I. A. 215.
2. (1887) I. L. R. 9 Cal. 406 & L. R. 36 I. A. 203.

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S. 12 of the Charter of the High Court and S. 19 of the Code of Civil Procedure were referred to.

The Judgment of their Lordships was delivered by

Lord Moulton.—In this appeal the appellant Harendra Lal Roy Chowdhri is the plaintiff in the action which was commenced by a plaint filed on the 16th September 1905. The claim of the plaintiff was based on a mortgage decree dated 28th July 1905, granted in a civil suit in the High Court of Judicature at Fort William in Bengal, acting under its ordinary original civil jurisdiction. That mortgage decree purported to enforce an English mortgage of the 23rd September 1895 executed by the *pro forma* defendant Mani Mohan Roy in favour of the plaintiff of certain properties, among which was an eight anna share of lands known as Mahal Gumokpota. The object of the present suit is to obtain a declaration that the female defendant Hari Dasi Debi acquired no right of ownership or possession in that property by virtue of an auction purchase made by her on the 23rd of November 1904. It is therefore brought to establish the title of the plaintiff to those lands as being lands charged under his mortgage and subject to the decree free from any prior right of the female defendant.

The transactions between the parties to the suit and the litigation arising therefrom are of the most complex character, and raise questions of considerable difficulty, both in fact and law. But the respondents, at the hearing of the appeal, raised a preliminary point which goes to the root of the action, namely, that the plaintiff shows no title enabling him to bring such an action. They submit that the mortgage of the 23rd September 1895 was not duly registered, and further that the Court which granted the mortgage decree of the 28th July 1905 had no jurisdiction to entertain the suit in which that decree was granted. If these contentions of the respondents can be sustained, it is clear that the plaintiff's action must fail, and that the decision of the High Court dismissing this action must be affirmed.

The facts of the case, so far as they are relevant to this preliminary point, are as follows ; On 23rd September1895 Mani Mohan Roy purported to mortgage to the plaintiff various

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properties set out in a schedule to the mortgage deed for the purpose of securing an account current of Mani Mohan Roy with the plaintiff, and freeing him from certain liabilities. The properties in question as set out in the schedule are 28 in all, the first being the eight anna share of Mahal Gumokpota, to which the suit relates, and the last property described as follows:—

"All that two-storied brick-built messuage, tenement, or dwelling-house, with " the piece or parcel of rent-free land on part whereof the same is erected and " built, containing by estimation ½ cottah, situate, lying, and being premises " No. 25, Guru Das Street, Jorasunko, in the town of Calcutta, and butted and " bounded—on the north, by a private lane of Ashutosh Dey; on the east, by the " dwelling-house of Nandakumari Dasi; on the south, by the dwelling-house of " Khetra Mohan Dhara; and on the west, by a Government drain."

This last property is the only one which purports to be in the town of Calcutta. All the other properties enumerated in the Schedule are outside Calcutta and outside the local limits of the ordinary original jurisdiction of the High Court of Judicature at Fort William in Bengal.

This mortgage was presented for registration at the Calcutta Registry Office by the executant Mani Mohan Roy on the day of its execution and registered by the Sub-Registrar in the usual manner. In 1903 the plaintiff brought a suit on this mortgage deed against the defendant Mani Mohan Roy and others, in the High Court of Judicature at Fort William in Bengal, and on the 28th July 1905 obtained the ordinary decree for sale. Neither of the two effective defendants in the present suit were parties to such action. The parties to the suit upon the mortgage seem to have set up that there was a mistake in the description of parcel 28, and that the words Ashutosh Dey Lane should be substituted for Guru Das Street. The learned Judge accepted this contention and accordingly held that property situate in Calcutta was included in the mortgage and that he had jurisdiction. No such decision, if erroneous, could extend the jurisdiction of a court of limited territorial jurisdiction, and therefore the validity of this decree is open to challenge by the present defendants, who were no parties to the proceedings. Similarly, the direction of the said Judge that the description of the parcel in question should be amended (even if it was effective between the parties to that suit) cannot affect the present defendants, whose title is of earlier date, or render valid the registration if they can maintain their

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contentions relating thereto. It is difficult, indeed, to see how the direction to amend the description of the parcel which formed part of the decree came within the scope of the suit; which was in no respect a suit for rectification.

The defendant Mani Mohan Roy did not appear in the present suit. The female defendant Hari Dasi Debi, and third defendant Hem Chandra Ghose (who was interested in the suit as claiming an interest in the property through her), appeared and filed written statements clearly putting in issue the existence of the property No. 28 above set forth, and alleging that no portion of the property mortgaged by the mortgage bond lay within the jurisdiction of the High Court of Judicature at Fort William in Bengal in its original jurisdiction or within the jurisdiction of the Sub-Registrar of the Calcutta Registry. Accordingly they contended that the alleged mortgage was not legally registered, and that the decree was given by a Court which had no jurisdiction to entertain a suit on the mortgage bond in question.

At the hearing of the action the plaintiff called no evidence with regard to the parcel No. 28. Neither the plaintiff nor Mani Mohan Roy went into the box to give evidence as to there being any mistake in the description of the parcels. On the other hand, the defendants proved that there is not and has never been any such property as No. 25, Guru Das Street, in Calcutta, and they further proved that the property lying within the metes and bounds set out in parcel 28 did not belong to Mani Mohan at the date of the mortgage bond, and that on the contrary he had not then and never has had any interest in the property within those metes and bounds. Such property has always belonged to parties wholly unconnected with the parties in this suit and has been continuously registered in their names in the Calcutta Registry.

It follows therefore that No. 25, Guru Das Street, which is the parcel No. 28, was a non-existing property. It was no doubt open to the plaintiff to prove that there was a clerical or other error in the description of the property, and that in fact an existing property situate in Calcutta was intended by both parties to be mortgaged and to be described in parcel No. 28. But there is not a particle of evidence that such was the case. Neither the mortgagor Mani Mohan nor the mortgagee the plaintiff Harendra Lal Roy went into the box to give evidence

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as to this. As to Mani Mohan their Lordships cannot see how it would have been possible for him to give any such evidence because it would amount to stating that he intended that the deed should purport to mortgage an existing property in which he had not and knew that he had not any property or interest whatever. This being so their Lordships, in the absence of evidence, decline to accept an unsupported suggestion of counsel that the description of the property mortgaged as No. 25, Guru Das Street, was inserted by mistake. It must be remembered that the proper description of houses in towns for the purpose of registration is by the street in which they are situated, and the number which they bear in that street, so that the description No. 25, Guru Das Street is that to which one should primarily look.

It may well be that the above is sufficient to preclude any rectification of the mortgage bond. If the mortgagor intended it to stand as it appears in the deed there is no question of mutual mistake. But if the case of the mortgagee be considered, there is similarly no ground whatever for thinking that there was any mistake. The only witness whose evidence has any bearing on the point is Harakumar Chakravarti. He was clerk to Messrs. Sen & Co., who were the plaintiff's attorneys at the time, and drew up the mortgage, and he witnessed its execution by Mani Mohan and the admission of that execution before the sub-registrar. He does not refer to the matter in his examination in chief, but in cross-examination he says that he did not himself enquire about the house No. 25, Rajah Guru Das Street, but sent the broker to ascertain the boundaries of the house which shows that it was the above description of the house that he relied on, and that it was a house so described that was intended by the parties to be included in the mortgage. But with regard to this house he makes some very serious admissions. He says :—

"I do not know whether there is such a house as No. 25, Rajah Guru Das "Street. I did not keep any original title deed respecting this property. I did "not see any original title deed regarding 25, Rajah Guru Das Street before or "after the mortgage."

Considering that he was acting on behalt of the mortgagee, the fact that he took no steps to ascertain whether the mortgagor had any title in this property points strongly to the knowledge of the mortgagee that the entry was a fictitious one. Coupling this with the fact that neither this witness nor the plaintiff gave

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any evidence as to there being any mistake or as to their knowledge and belief as to the existence of the property at the date of the mortgage (although these issues were plainly raised in the pleadings of both the defendants), their Lordships decline to accept the suggestion that there was a mistake on the part of the mortgagee any more than that there was a mistake on the part of the mortgagor. The fact that neither the mortgagee nor the mortgagor gave evidence in support of the suggestion of a mistake has great weight with their Lordships. The defendants having proved that the house which purported to be mortgaged did not exist, and that the property contained in the metes and bounds mentioned in Parcel 28 was property of strangers in which the mortgagor had not and never had any interest had proved all that was necessary to throw upon the plaintiff the burden of showing that the entry of this parcel was not a fictitious entry. He might have done this by showing mistake or otherwise, but he did not do so, but abstained from giving any evidence whatever on the subject, although both he and Mani Mohan were available to give evidence, and were the persons who could establish the facts of the case. Taking all these matters into consideration, their Lordships can come to no other conclusion than that Parcel No. 28 was to the knowledge of the parties to the deed a fictitious entry probably designed to give to the deed the appearance of relating to property situated in Calcutta and therefore within the jurisdiction of the Sub-Registrar and the Calcutta High Court, so that registration could be obtained and actions brought in Calcutta.

It was strongly contended before their Lordships that a Subordinate Judge had found that it was a mistake, and that the High Court had accepted his finding so that the principle of two concurrent findings of fact would apply.

But their Lordships are of opinion that the principle of concurrent findings of fact does not apply to such a case as the present inasmuch as it is a case of no evidence, and according to the well known principles of our law a decision that there is no evidence to support a finding is a decision of law. The issue is that the existing description of the parcels was inserted by mistake. A mistake means that parties intending to do one thing have by unintentional error done something else. There is no evidence

whatever here that the error was unintentional or indeed that there was any error at all, and their Lordships are therefore free to set aside the finding without in any way departing from their practice regarding concurrent findings of fact.

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It is perhaps necessary in this connection to point out that the document upon which the Subordinate Judge based his finding of mistake was not evidence between the parties nor relevant to the issue. In some other mortgage deed of later date and to other mortgagees Mani Mohan had apparently purported to mortgage the same property by the same description, and had been compelled by the mortgagees to consent to rectification. Such a fact was wholly irrelevant, and it is extraordinary that it should have been allowed to be proved at the trial.

It remains to consider the effect of their Lordships' finding. It may be looked at in two ways. In the first place the property, 25, Guru Das Street, purporting to be mortgaged, is a non-existing property, and therefore no portion of the property mortgaged is situated in Calcutta. The deed, therefore, could not be registered there, nor had the Court of Ordinary Original jurisdiction of Fort William in Bengal any jurisdiction to entertain the suit upon the mortgage bond, and its decree is of no validity. The plaintiff therefore has no title to maintain the suit and it must be dismissed.

But the point may be put in another way upon broader grounds. Their Lordships hold that this parcel is in fact a fictitious entry, and represents no property that the mortgagor possessed or intended to mortgage, or that the mortgagee intended to form part of his security. Such an entry intentionally made use of by the parties for the purpose of obtaining registration in a district where no part of the property actually charged and intended to be charged in fact exists, is a fraud on the Registration law, and no registration obtained by means thereof is valid. To hold otherwise would amount to saying that mortgages relating solely to land in other parts of the Presidency could be validly registered by the Sub-Registrar at Calcutta if the parties merely took the precaution to add as a last parcel, Government House, Calcutta, or any similar item. The same

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considerations apply to the question of jurisdiction of the High Court of Fort William in Bengal in its ordinary original jurisdiction. No such fictitious item inserted to give a colourable appearance of the deed relating to property in Calcutta when in reality such is not the case could bring the deed within the limited jurisdiction of the Court. For the same reasons, therefore, as have been stated above, the plaintiff's case fails.

Their Lordships therefore will humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitors for appellant—*T. L. Wilson & Co.*

Solicitor for respndents—*Watkin & Hunter.*

PRIVY COUNCIL.

Present:—Lord Parker of Waddington, Sir John Edge and Mr. Ameer Ali.

(On Appeal from the High Court at Allahabad.)

Shoharat Singh and others ... *Appellants**

v.

Musammat Jafri Bibi ... *Respondent.*

Shoharat Singh *v.* Musammat Jafri Bibi

Mahommedan Law—Shia School—Nikka—Muta—Legitimacy—Presumption—Evidence—Limitation bar to claims of some co-heirs—Benefit not to the other co-heirs.

Where a Mohammedan of the Shia School had contracted a Muta marriage with a woman and had several children by her, of whom two daughters were alive, and afterwards married her by nika and had a daughter by her who claimed ⅔ of the entire estate of her father.

Held that she was only entitled to ⅓ of ⅔ inasmuch as according to Shia law the two other daughters of the deceased father born during the continuance of the Muta were also legitimate and entitled to an equal share with her.

Held, further that when cohabitation is proved after Muta, the presumption is in favour of its continuance, although Muta marriage (a temporary marriage, the duration of which is fixed by agreement between the parties) as such does not confer on the wife any right or claim to inherit from her husband, where some of the heirs are barred, the benefit of it should go to the party in possession and not to the other to heirs.

Appeal from a Judgment and Decree of the High Court dated February 9, 1910 reversing a Judgment and Decree of the Subordinate judge of Gorukhpur, dated May 27, 1907.

The facts of the case are sufficiently set forth in their Lordships' Judgment.

At the time of the suit before the officiating Subordinate judge of Gorakhpur some thirteen issues were framed, but judgment was given only on two. In Appeal to the High Court the case was remanded to the lower Court to determine the other issues also. This was done by the successor in office of the aforesaid officiating Subordinate judge who had no opportunity of seeing the demeanour of the witnesses.

De Gruyther K. C. with him *Dube* for the appellants, contended that the probability was that no Nika had taken place and that the continuance of Muta was not proved. The witnesses should not be relied upon where the probability was against the reception of their evidence. The Kabinnama was not proved to have been executed by Muhammed Kazim Hussain. The appellants were entitled to protection as being *bona fide* purchasers for value.

* 18th May 1914.

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Lowndes for the respondent contended that the respondent was the only legitimate daughter of Muhammed Kazim Husain and was as such entitled to ⅞ of his estate. The Appellants had no legal or equitable claims as against the respondent to any portion of the estate.

De Gruyther replied.

The Judgment of their Lordships was delivered by

Lord Parker of Waddington. The questions which arise for decision on this appeal are substantially questions of fact only. Was Muhammad Kazim ever married to Achchhi Bibi, and if so, when, and were there any children of the marriage? There is no doubt that Muhammad Kazim left three daughters by Achchhi Bibi him surviving, of whom the plaintiff was the youngest, and that those three daughters, if legitimate, were entitled to succeed to his property as co-heirs. But the defendants to the action (the now appellants) allege that they were illegitimate, or alternatively that if the plaintiff was legitimate, so also were her sisters, so that the plaintiff was entitled to succeed to one-third only of her father's property. The plaintiff (the now respondent) alleges on the other hand that although her father and mother lived together as man and wife for many years they were married about 1½ years before she was born and not earlier, that she therefore was his only legitimate child.

The plaintiff tendered in proof of the marriage of her parents a deed said to have been executed by Muhammad Kazim on the 11th April 1884, a translation of which will be found at page 90 of the record, and also the depositions of several witnesses who deposed to the marriage ceremony having taken place in their presence about the same date. The Subordinate Judge was of opinion that the deed was a forgery, and that these witnesses were not telling the truth. The High Court having before it additional evidence of considerable importance came to a contrary conclusion, holding that the deed was genuine and that the marriage ceremony had been performed as deposed to by the witnesses. The present appeal is from this decision of the High Court.

The deed in question is a deed of dower. In it Muhammad Kazim, who was a Mohammedan of the Shia sect, declared that Achchhi Bibi had been living with him for some years past, and

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that he had contracted *muta* with her in the beginning; that owing to their mutual love and affection he had long intended performing *nikah* with her, but owing to certain circumstances, as well as to the unwillingness of some members of his family, he could not do so; that a suit was recently instituted on his behalf in which his deposition was taken; that in this deposition he had not considered it advisable to admit his *muta* with Achchhi Bibi; that she came to know of this, and by reason of it a disagreement took place between them; that as he had made up his mind before this to perform *nikah* with her and as it was also necessary to remove the disagreement between them he had of his own free will and accord performed *nikah* with Achchhi Bibi at a dower of Rs. 50,000, at a general meeting at which *raises* and respectable residents of the city were present; hence he had executed that deed as a memorandum of the dower and *nikah* that it might be of use in time of need.

A *muta* marriage is, according to the law which prevails among Shias, a temporary marriage, its duration being fixed by agreement between the parties. It does not confer on the wife any right or claim to her husband's property, but children conceived while it exists are legitimate and capable of inheriting from their father. A *nikah* marriage is a religious ceremony, and confers on the woman the full status of wife, and children born after it are legitimate.

If the deed in question be a genuine deed, and the statements in it be taken as true, then not only was there a *nikah* marriage between Muhammad Kazim and Achchhi Bibi at or about the time of its execution, but their cohabitation originated in a *muta* marriage. There is no evidence as to the original term for which this *muta* marriage was contracted, but such term, whatever it was, may from time to time have been extended by agreement; and in their Lordship's opinion, if it be once proved that the cohabitation originated in a *muta* marriage, the proper inference would, in default of evidence to the contrary, be that the *muta* continued during the whole period of cohabitation.

Besides the deed itself there is ample corroborative evidence of the *nikah* marriage there referred to, if the witnesses called

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to depose to the actual ceremony are treated as worthy of credit. There is also some corroborative evidence of the *muta* marriage.

After careful consideration of all the evidence their Lordships have come to a conclusion that they ought not to reverse the findings of the High Court as to the genuineness of the deed of dower or the credibility of the witnesses who deposed to the celebration of the *nikah*. The judges who were parties to these findings have necessarily a large experience in matters of this nature. The Subordinate Judge had no more opportunity than they had of seeing and observing the demeanour of the witnesses, and they on the other hand had evidence before them which was not before the Subordinate Judge. No doubt, as pointed out by the learned Counsel for the appellants, there are good reasons why both the deed itself and the evidence of the witnesses in question ought to be looked upon with suspicion and scrutinised with great care. Their Lordships do not think it necessary to go into these reasons. It is enough to say that, after scrutinising the evidence with the greatest care, they do not see their way to disturb the findings of the Court below.

There is, however, one matter which does not appear to have been considered by the High Court with the attention which it deserved, and that is the question of the *muta* marriage. If the deed be treated as a good and valid deed, and the plaintiff's witnesses as reliable witnesses, there is considerable evidence that the cohabitation of Muhammad Kazim and Achchhi Bibi commenced in a *muta* marriage, and if this be so in default of evidence to the contrary, such marriage must be taken to have subsisted throughout the period which covered the conception and birth of the plaintiff's two sisters. These sisters would thus be co-heirs with the plaintiff of their father's property. It is true that their claim as such is statute barred, but the expiration of the period of limitation would accrue for the benefit of the defendants in the action (the now appellants), and not for the benefit of the plaintiff (the now respondent). In their Lordships' opinion the proper conclusion on the assumption that the *nikah* marriage took place as alleged, was in favour of a *muta* marriage having also taken place, and of the legitimacy of the plaintiff's sisters, in which case the plaintiff was entitled to one-third only of what she has recovered under the order of the High Court.

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In their Lordships' opinion the case should be remitted to the High Court to be dealt with on this footing; the order must be varied in this respect, with liberty to either party to apply to the High Court to vary the order as to costs; and there should be no costs of this appeal which has in part succeeded and in part failed. And they will humbly advise His Majesty accordingly.

Solicitors for Appellants:—*Pyke, Parroth & Co.*

Solicitors for Respondent:—*Barrow, Rogers & Nevill.*

PRIVY COUNCIL.

Present:—Lords Dunedin and Moulton, Sir John Edge and Mr. Ameer Ali.

(On appeal from the High Court at Calcutta.)

Bijraj Nopani and another ...*Appellants**

v.

Sreemutty Pura Sundary Dassee ...*Respondent.*

Bijraj Nopani v. Sreemutty Pura Sundary Dassee

Hindu law of Bengal School—Will—Executor—Sale by without stating that sale is as executor—Stridhan—bona fide purchaser for value—Unmarried daughter of daughter as legatee—Deed—Construction—Plain interpretation—not to be controlled by indications of intention.

Where a Hindu had given away by will his house to his daughter subject to certain annuities and appointed one of her sons as one of the executors who to pay off certain mortgage debts created in the interest of the estate, sold the house in question without expressly mentioning in the deed that he was selling as executor, but on the other hand stating that he (and others) were selling "all the estate right, title, enterest, claim and demand whatsoever of the vendors unto and upon the said messuage, land, hereditaments and premises and every part thereof, and also all deeds, papers, and writings solely relating to the said premises or any part thereof now in the custody of the vendors or which they can procure without suit", on the death of the daughter one of her unmarried daughters claiming the estate as stridhan of her mother calling into question the conveyance thereof by her brother as by one that had no title thereto under the Bengal School of Hindu Law.

Held that the conveyance by the vendors of all the right, title and interest which they possessed included the right which one of them possessed as executor.

That to hold on what the court considers the indications in the deed and the intention of the parties that only the beneficial interest possessed by the vendors should be conveyed would be to contradict the deed itself; that it is a settled rule of interpretation that a deed must be interpreted by the language used interpreted in its natural sense.

That it would be entirely contrary to settled principles of law as well as most unjust to *bona fide* purchasers were the courts to allow its plain legal interpretation to be affected by speculations as to what particular rights existing in the various vendors were present to the minds of some or all of the parties to the conveyance at the date of the execution.

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* 11th May, 1914.

Bijraj Nopani
v.
Sreemutty
Pura Sundary
Dassee

Appeal from a Judgment and Decree of the High Court dated January 25, 1910 on an appeal from a Judgment and Decree of the same in the exercise of its ordinary original jurisdiction dated February 15, 1909.

The facts of the case are sufficiently set forth in their Lordships' Judgment.

Sir Robert Finlay K. C. with him *Dube* for the appellants contended that the recitals of the deed of conveyance left no doubt that Hemendranath was selling as executor also. The parties to the deed thought this capacity of Hemendranath as material because provision was made by the purchaser for the payment of annuities and all those who were supposed to have any claim to the property were made parties. The purchaser paid the amount *bona fide* and took every possible step and care to satisfy all claims on the property in accordance with the provisions of the will. He was in any case entitled to the amount of money he spent in constructing a house on the site where the house of the testator stood, thereby improving the property.

Reference was made to *Preonath Karar* v. *Surya Coomar Goswami* 1 and Sec. 90 of the Probate and Administration Act of 1881.

De Gruyther K. C. and Dunne for the respondent contended that the conveyence by Hemendranath was not in his capacity as executor. Ignoring the claim of the respondent he conveyed as absolute owner under a mistaken belief that he was entitled to the estate absolutely. The respondent who was entitled to a moiety by law could not be deprived of her rights under the circumstances. Even as executor he had no power to sell.

Was the question of the construction of the deed accepted, by all parties?

[Mr. Ameer Ali. She (respondent) was a minor when the deed was executed.]

She was so for years.

[Lord Dunedin: If you choose to pay costs you can go back.]

They all joined in the deed as beneficial owners.

1. (1891) I. L. R. 19 C. 26.

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[Lord Moulton: when all join as vendors, it does not follow that they all have same interests.]

Sir Robert Finlay K. C. in reply.

The judgment of their Lordships was delivered by

Lord Moulton. This is an appeal in a suit brought by the respondent against the appellants for a declaration of her title to an equal undivided half part or share in a certain house and premises known as 8, Sobharam Bysack's Street, Calcutta, and for recovery of the premises from the appellants, in whose possession they were at the commencement of the suit, with an inquiry as to mesne profits. The facts of the case, so far as they are material, are not now in dispute, and are as follows:—

The house and premises originally belonged to Prem Chand Bysack, who died on the 13th June 1886, leaving a will, dated 25th October 1884. By his will the said testator devised and bequeathed the said house and premises "to his daughter Katyani Dassee and her heirs absolutely," subject to two charges of 20 rupees per month, payable to two of his daughters-in-law and their children as and for periods specified in the will. He appointed as executors Shambhoo Nath Byzack (the husband of his daughter, Katyani Dassee), and two of her sons, Hemendra Nath Bysack. On application for probate of this will, the executors found that a caveat had been entered by some of the relations of the deceased testator, who alleged that the will was a forgery. This led to a suit, where, after a prolonged inquiry, the Court, on the 16th May 1887, pronounced the will to be genuine and granted probate of it, and directed that the costs of the executors should be paid out of the testator's estate.

It would appear that the executors had no funds in hand out of which they could meet the costs of this litigation, and they therefore mortgaged the property for a sum of Rs. 3,950 to Dwarka Nath Dutt, who had been their attorney in the probate suit, in order to secure the payment of his costs, which amounted to Rs. 3,400, the balance, Rs. 550, being treated as a loan to them. Katyani Dassee was made a party to the mortgage bond apparently to put on record her wish that no portion of the estate should be sold to defray these costs. The term of the mortgage was 10 years.

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Shambhoo Nath Bysack died in 1889, and Ratanlal Bysack died in 1891, leaving his brother Hemendra Nath Bysack sole surviving executor. In 1891 Katyani Dassee also died, leaving four sons and two unmarried daughters, of which the respondent was one.

In 1900 the heirs of Dwarka Nath Dutt, who had died in the meanwhile, instituted a suit against Hemendra Nath Bysack as sole surviving executor for sale of the property under their mortgage, and at the same time the two annuitants brought suits against him for arrears of their annuities. To meet these demands it was determined to sell the property, and accordingly by a deed, dated the 12th of December 1900, the property was sold to the appellant Bijraj Nopani, one of the appellants, and Dowlatram, since deceased. The other appellants are sued as the executors of his last will and testament, one of them being Bijraj Nopani himself. It is on the interpretation of this deed of conveyance that the question now in issue depends, and in order to make clear the contentions of the two parties it is necessary to explain its form and to state how the dispute has arisen before discussing the construction of the deed.

The deed is made between Hemendra Nath Bysack and his two surviving brothers of the first part, Baroda Sundary Dassee, one of the annuitants of the second part, and Bijraj and Dowlatram of the third part. It recites that the property originally belonged to Prem Chand Bysack, that he devised it to his daughter Katyani Dassee and her heirs absolutely, subject to a charge for annuities of Rs. 20 per month, to Baroda Sundary Dassee and Sonamoni Dassee respectively, and that he appointed Shambhoo Nath Bysack, Hemendra Nath Bysack, and Ratanlal Bysack executors of such will. It then recites the obtaining of probate of the will after suit. It then recites the death of Katyani Dassee on the 8th day April 1891, leaving five sons and three daughters, and the death of two of the sons unmarried, and also the death of Shambhoo Nath Bysack on 9th January 1899.

There next comes a recital that Hemendra Nath Bysack on the 4th day of September 1900 obtained an order whereby it was referred to the Registrar of the High Court to enquire

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whether there was any necessity for the sale of the said house, and what provision should be made to secure the payment of the legacies mentioned in the said will out of the rents and profits of the house. It next recites that—

"the said Hemendra Nath Bysack, the sole surviving executor of the said will, "has since paid all the debts, liabilities, and legacies mentioned in the said will."

Then follows a recital that Sonamoni Dassee has filed a suit against the said Hemendra Nath Bysack for, amongst other things, a declaration of her rights under the said will, and that the vendors have taken upon themselves the responsibility of entering satisfaction in the said suit, as also of satisfying the claims of any of their sisters, and that therefore the petition will not be proceeded with. There next comes a recital that the vendors have agreed with the purchasers that Rs. 10,000 shall remain with the purchasers as security for the annuity to Sonamoni Dassee, and that the other annuitant has been paid off by a sum of Rs. 708 in full satisfaction of her claim against the property.

Here the recitals terminate and the indenture goes on to witness that the vendors have sold the property to the purchasers for Rs. 35,000, of which Rs. 10,000 are to be retained by them as security as aforesaid. The vendors grant, sell and convey the property to the purchasers in ordinary form, together with "all the estate right, title interest, claim, and demand whatsoever "of the vendors unto and upon the said messuage, land, heredita- ' ments, and premises and every part thereof, and also all deeds, "papers, and writings solely relating to the said premises or any "part thereof now in the custody of the vendors or which they "can procure without suit."

Then follows a covenant in the following words :—

"The vendors do for themselves and himself, their and his heirs and represen- "tatives do, and each of them doth hereby covenant with the purchasers, their heirs, "representatives, and assigns in manner following, that is to say, that the "vendors at the time of sealing and delivery of these presents are lawfully, right- "fully and absolutely possessed of and in the said messuage, land, and hereditamnts "hereinbefore granted and conveyed as an equivalent to fee simple in possession, "free from encumbrances, and that the vendors now have in themselves full power "and absolute right, title, and authority by these presents to grant and convey the "said messuage, land, hereditaments, and premises unto, and to the use and be- "hoof of the purchasers, their heirs, representatives, and assigns from time to time

Finally there is a covenant to indemnify the purchasers against any loss at the suit of the annuitant, Sonamoni Dassee,

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or the three sisters (of whom the respondent is one), which may be incurred by them by or by reason of the defect, if any, in the title of the vendors to the property.

The appellants paid the purchase money and took possession of the property under the conveyance, and remained in possession until the 22nd June 1897, when the respondent brought the present suit, claiming that she was entitled to one-half share in the said house, because as she and her sister Kanak Manguri Dassee were unmarried daughters they were entitled to share equally her property, inasmuch as it was *stridhan* she claimed that she was not bound by the said sale.

The respondents' claim to a moiety of her mother's *stridhan* is admitted to be good in law, so that the only question in the suit is whether the conveyance was valid. It is plain that at the date of this conveyance the property was still in the hands of the sole surving executor, Hemendra Nath Bysack, and therefore he was competent as executor to sell it to the appellants, who were *bona fide* purchasers for value. But the respondent contends that although Hemendra Nath Bysack was in a position validly to convey it to the appellants as such executor, and did purport to convey it, he did not effectively do so, because the deed shows that he intended only to convey as a beneficial owner of the property, being under the impression that he and his two brothers, the co-vendors, were beneficially entitled to it as heirs to their mother, and being ignorant or forgetful of the right of the sisters to inherit in preference to them. It is on this ground alone that the High Court decided in favour of the respondent, reversing the decision of the Judge of the Court below, who had held that Hemendra Nath Bysack had by the deed conveyed all the right and title he possessed in every capacity, including the sole surviving executor of the will of Prem Chand Bysack.

Their Lordships are of opinion that the judgment of the Judge of First Instance was right and ought to have been affirmed by the Court of Appeal. In the first place the deed itself gives abundant evidence that the position of Hemendra Nath Bysack as sole surviving executor was viewed as material by the parties to the conveyance, inasmuch as there are careful recitals as to the original appointment of executor which could have no bearing on the conveyance if it were not that it affected, or might affect, his

title to convey. But even in the absence of such direct evidence that the conveyance was by him in his capacity as executor as well as beneficial owner (if and to the extent that he was such owner), the deed makes it clear that all the vendors convey all the title and right that they possess in the property, and that would undoubtedly include the right and title which one of them possessed as executor. That this would be the ordinary rule is admitted by the Judges of the Court of Appeal, who base their judgment on what they consider to be indications in the deed and in the conduct of the parties that the intention was that only the beneficial interest possessed by the vendors should be conveyed. Their Lordships are of opinion that this would be to contradict the deed itself; and moreover they are of opinion that the matters referred to would not support the conclusion drawn therefrom by the Judges of the High Court even if it was permissible to permit such considerations to affect the interpretation of the deed.

If the deed be considered from the point of view of the appellants who were the purchasers and who were not otherwise concerned with the property or its history, the transaction as well as the deed which carries it out, become perfectly clear and intelligible. The property was by the will charged with two annuities, and in order that the executor might procure the funds necessary to pay the costs of past litigation the property was under mortgage. This mortgage was being called in and the sale was to enable the mortgage money to be raised. The purchasers naturally desired a clear title free from entanglements. They therefore required that the mortgage should be paid off and the annuitants settled with or security given against their claims. For both these purposes it was necessary that Hemendra Nath Bysack as executor should be a party to the deed, because the original mortgage was effected by him for the purpose of securing the costs for which he was of course liable, and on his discharging the indebtedness as to costs he would become entitled to claim for the same as against the estate including the house in question. Moreover, it is abundantly clear from the executor's accounts and from all the facts appearing in the record that the house still formed part of the undivided estate and that therefore he would be liable to pay the annuitants the amount of their

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annuities from time to time, as he had been doing for years, past. The purchasers would not be likely to trouble themselves as to the question of whether or not the property would ultimately go to the sons or daughters, but would take care that all the persons in whom title could in anywise exist should join in the conveyance, and that they should be guaranteed against claims from those who did not do so. This is what the deed shows to have been done, and it would be entirely contrary to settled principles of law as well as most unjust to *bona fide* purchasers if the Courts were to allow its plain legal interpretation to be affected by speculations as to what particular rights existing in the various vendors were present to the minds of some or all of the parties to the conveyance at the date of its execution. The deed states plainly that whatever right or title the vendors possess is to go to support the conveyance, and it is a settled rule that the meaning of a deed is to be decided by the language used interpreted in its natural sense. From this wholesome rule their Lordships see no reason for departing in the present case.

Their Lordships will therefore humbly advise His Majesty that this appeal should be allowed and that the judgment of the Court of Appeal should be set aside, with costs, and the judgment of the Judge of first instance restored. The respondents will pay the costs of this appeal

Solicitors for appellant—*Barrow, Rogers & Nevill.*

Solicitors for Respondent—*Burton, Yeates & Hart.*

PRIVY COUNCIL.

Present.—Lords Moulton & Parker of Waddington, Sir John Edge & Mr. Ameer Ali.

On appeal from the High Court at Calcutta.

Bahaiaji Thakur ... *Appellant.**

v.

Jharula Das ... *Respondent.*

Bahaiaji Thakur v. Jharula Das

Religious Endowment—Shebaitship—Hereditary office—Possession—Hindu Law Widow—Mortgage of income from offers by—Sales in execution—Suit to set aside, by widow—Dismissal of—Res Judicata—Limitation Act, art. 124—Receipt of income, not possession of office—By person not shebait—Actionable wrong—C. P. C old Code s. 244—Suit to set aside a decree not within.

Where in execution of a decree upon a mortgage executed by a Hindu widow who was the shebait of a temple, the defendant purchased 3½ as share of the daily surplus income to which she was entitled in her right as such shebait from the

* 26th May 1914.

Bahajaji Thakur v. Jharula Das.

offerings to the temple and was found to have been in receipt of the same ever since though not being a Brahmin, he could not perform the Pooja which was being attended to as heretofore by the widow and a suit to set aside the decree and the sale on the ground of fraud brought by the widow was dismissed as barred by s. 244 C. P. C. on the death of the widow a fresh suit being instituted by the reversioner to recover possession of the income which was dismissed by the High Court both on the ground of limitation under art. 124 of the Limitation Act and *res judicata* by reason of the decision in the previous suit by the widow.

Held that the decision in the suit brought by the widow did not operate as *res judicata*.

(2) That it was also not barred by limitation. The suit was not one for possession of an hereditary office. The right to the office did not arise from or depend upon the receipt of the share of income although the right to receive the income was attached to and dependent upon the possession of the right to the shebaitship. By adversely taking and appropriating to his own use a share of the surplus income defendant acquired no rights or title to the share of the income and on each occasion upon which he received and wrongfully appropriated a share of the income he committed a fresh actionable wrong in respect of which a suit could be brought but it did not constitute him a shebait for the time being or affect in any way the title to the office.

S. 244 C. P. C. cannot apply to a suit which in effect is brought to set aside the decree on the ground of fraud.

Appeal from a Judgment & Decree of the High Court dated March 12,1912 varying a Judgment & Decree of the Subordinate Judge of Bhagalpur, dated April 3rd 1911.

The facts of the case are sufficiently set forth in their Lordships' Judgment.

A. M. Dunne and *B. Dube* for the Appellant.

G. R. Lowndes for the Respondent.

A. M. Dunne for the appellant contended that shebait's right to receive offering made to the Deity was not alienable. The appellant being a reversioner was not bound by a decree obtained against a widow in possession which was not proved to have been for debts incurred for legal necessity.

G. R. Lowndes for the respondent contended that the possession and receipt of the offerings by the respondent was adverse to the rights of the appellant and by art. 124 of the Indian Limitation Act of 1908 his suit was barred by limitation. The dismissal of the suit brought by the widow in possession was binding upon the reversionary heirs of her husband and *res judicata*. He was precluded from bringing any action in respect of the property in question.

Bahaiaji Thakur v. Jharula Das

The judgment of Their Lordships was delivered by

Sir John Edge.—The appellants here are the heirs and legal representatives of one Bhaiaji Thakur, now dead, who was the plaintiff in the suit in which this appeal has arisen. Bhaiaji Thakur was a shebait of the ancient temple of Mahadeoji, called Singheswar Temple, which is situate in Mawza Gouripur, otherwise Singhaswarpur in the District of Bhagalpur. Bhaiaji Thakur became a shebait of the Temple on the death in 1900 of one Musammat Grihimoni who was the widow of one Pratipal Thakur. Pratipal Thakur had been a shebait of the Temple, and until his death had been as such shebait, entitled to receive a 3½ annas share of the daily surplus income from the offerings to, after defraying the expenses of the Temple, on his death his widow Musammat Grihimoni, succeeded to his shebaitship and accordingly became entitled to receive the same share of the daily surplus income from the offerings. The right to such 3½ annas share came to Bhaiaji Thakur on the death of Musammat Grihimoni as the next reversionary heir under the Hindu Law to the shebaitship. The shebaits of the Temple are Brahmin Pandas who, as shebaits have to perform, or to provide for the performance of, the sacred worship or *puja* of the Diety at the Temple. Jharula Das, who is the defendant to the suit and the respondent to this appeal, is by caste a Beldar, and as a Beldar, is not competent to perform, or to provide for the performance of, the sacred *puja* to the Deity at the Temple, and consequently was incapable of acquiring or holding the office of a shebait.

In 1880, Jharula Das obtained a decree for money on a mortgage which had been granted by Musammat Grihimoni. In execution of that decree Jharula Das in 1861 caused the 3½ annas share of Musammat Grihimoni to be put up for sale, and at the sale on the 20th November 1891 purchased the share. Jharula Das on the 8th February 1892 obtained a certificate of sale in which the property which he had purchased was described as the "Income of the Muth of Sri Singheswarthanji Mahadeo, which "muth is situated in Mouzah Singheswarthan, pergunnah, Nisan-"khipur Khurha, to the extent of 3 annas 6 pies, which belongs "to the judgment debtor, within the jurisdiction of the Madhe-"pura Sub-registry Office, Bhagalpur Collectorate."

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In November 1892 Musammat Grihimoni and Bhaiaji Thakur brought a suit against Jharula Das to have the sale to him of the 20th November 1891 set aside. That suit was by the permission of the Court withdrawn by Musammat Grihimoni and Bhaiaji Thakur with liberty to bring a fresh suit on the same cause of action. In 1895, Musammat Grihimoni brought a fresh suit against Jharula Das to have the sale set aside on the ground that the decree and the order for sale had been fraudulently obtained by Jharula Das. The suit of 1895 was dismissed on appeal on the ground that her proper remedy was by an application under Section 244 of the Code of Civil Procedure, 1882, to dispute the validity of the sale, and consequently that the suit did not lie. Their Lordships fail to understand how Section 244 of the Code of Civil Procedure, 1882, could have applied to a suit which in effect was brought to set aside the decree of 1880, and the order for sale, on the ground that Jharula Das had obtained them by fraud.

Musammat Grihimoni died in 1900. On the 25th January 1910 Bhaiaji Thakur brought the present suit in the Court of the Subordinate Judge of Bhagalpur and claimed possession of certain lands mesne profits and a declaration that he was entitled to receive the 3½ annas share of the net income from the offerings to the Temple with other reliefs. In his written statement the defendant Jharula Das alleged so far as is now material that Bhaiaji Thakur was bound by the decree which dismissed Musammat Grihimoni's suit of 1895, and that the decision in that suit operated on the principle of *res judicata* to defeat the claim in respect of the 3½ annas share. At the trial a defence that the suit was barred by limitation was raised. As to the defence of *res judicata* the Subordinate Judge rightly held that the decision in Musammat Grihimoni's suit of 1895 did not operate as a bar to this suit. On the question of limitation the Subordinate Judge found that Jharula Das had not purchased the right of Shebaitship, but the Subordinate Judge held that the appropriation by Jharula Das of the 3½ annas share of the surplus income from the offerings to the Temple practically amounted to a dispossession, and treating Bhaiaji Thakur's suit, so for as it related to the 3½ annas share, as a suit for the establishment of his right to Shebaitship and for recovery of the profits of that office, and having found that Musammat Grihimoni had died in 1900, he

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applied Article 124 of the Second Schedule of the Indian Limitation Act, 1908, decided that the suit had been brought within time. On the 3rd April 1911 the Subordinate Judge gave to the appellants here, who had been brought on the record as the representatives of Bhaiaji Thakur, who had died, a decree for possession of the land claimed, for possession of the 3½ annas share of the net income from the offerings to the Temple, and for mesne profits subsequent to the institution of the suit. From that decree of the Subordinate Judge Jharula Das appealed to the High Court of Judicature at Fort William in Bengal. The High Court in the appeal upheld the decision of the Subordinate Judge so far as it related to the land claimed and to mesne profits in respect of the wrongful possession by Jharula Das of that land and to that extent by their decree affirmed the decree of the Subordinate Judge. With that part of the decree of the High Court this Appeal is not concerned. The learned Judges of the High Court considering that Article 124 of the Second Schedule of the Indian Limitation Act 1908 applied to the claim in respect of the 3½ annas share of the surplus daily income from the offerings to the Temple, and being of opinion that the 12 years' period of limitation provided by that article began to run in 1892, when Jharula Das first began to appropriate to his own use the income of the 3½ as share, decided that the claim in respect of the 3½ as share was barred by limitation. They also held that the claim to the share was barred by the principle of *res judicata*, arriving at that decision apparently on the view that the dismissal of Musammat Grihimoni's suit of 1895 extinguished the claim of the Shebait to the 3½ annas share. Accordingly, the High Court by its decree of the 12th March 1912 set aside the decree of the Subordinate Judge so far as it related to the claim to the 3½ annas share and the profits of that share. From that decree of the High Court the present appellants have appealed to His Majesty in council. The defendant Jharula Das has not appealed.

On the hearing of this appeal, the contention that the dismissal of Musammat Grihimoni's suit of 1895 extinguished the right of the Shebaits to the 3½ annas share, and that the claim in respect of that share was *res judicata* was very properly abandoned; it was untenable. But it was strongly contended on behalf of the respondent that the claim in respect of that share came

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within Article 124 of the Second Schedule of the Indian Limitation Act, 1908, and was barred by limitation. It is not necessary for their Lordships to consider whether, if that Ariticle applied, the 12 years' period of limitation began to run in 1892 or on the death of Musammat Grihimoni in 1900, as they are of opinion that Article 124 of the Second Schedule of the Indian Limitation Act, 1908, does not apply in this case. Bahaiaji Thakur's suit was not a suit for possession of an hereditary office. The office of shebait of the Temple was an hereditary office which could not be held by any one who was not a Brahmin Panda. Jharula Das was not a Brahmin Panda, he was of an inferior caste, and was not competent to hold the office of shebait of the Temple, or to provide for the performance of the duties of that office. The appropriation from time to time by Jharula Das of the income derivable from the $3\frac{1}{2}$ annasshare did not deprive Musammat Grihimoni, or, after her death Bahaiaji Thakur, of the possession of the office of shebait, although that income was receivable by them in right of the shebaitship. The right to the office of shebait did not arise from, or depend upon, the receipt of a share of the surplus daily income from the offerings to the Temple, although the right to receive daily a share of net income from the offerings to the temple was attached to and dependent on the possession of the right to the shebaitship. Unless the shebaits received their share of the daily net income from the offerings it does not appear how the ministrations of the Temple could be provided for. By adversely taking and appropriating to his own use a share of the surplus daily income from the offerings Jharula Das acquired no title and no right to a share of that income. On each occasion upon which Jharula Das received and wrongfully appropriated to his own use a share of the income to which the shebait was entitled Jharula Das committed a fresh actionable wrong in respect of which a suit could be brought against him by the shebait. But it did not constitute him the shebait for the time being or affect in any way the title to the office.

The appellants here are entitled to have the decree of the High Court so far as it relates to the $3\frac{1}{2}$ annas share, and to the costs in the High Court and in the Court of the Subordinate Judge varied by setting aside that part of the decree of the High Court which relates to the $3\frac{1}{2}$ annas share and those costs, and by

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giving them a decree for all the costs in the High Court and in the court of the Subordinate Judge, and a declaration that Bahaiaji Thakur was at the date of the suit entitled to the $3\frac{1}{2}$ annas share of the net daily income of the offerings to the Temple. Their Lordships of the net will advise His Majesty accordingly.

The respondent must pay the costs of the appeal.

Solicitors for appellants :—*Barrow, Rogers & Nevile*

Solicitors for respondent—*T. L. Wilson & Co.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Tyabji and Mr. Justice Spencer.

Marwadi Padmaji Miachand. v. Deputy Collector of Adoni.

Marwadi Padmaji Miachand and others ... *Appellants*.*

v.

The Deputy Collector of Adoni ... *Respondent*.

Land Acquisition Act (Act I of 1894)—Ss. 19, 23.—Burden of Proof—On the claimant to prove value insufficient—Reasons not given by Collector—Effect of—Speculative value by reason of proposed land development—When to be taken into account—Hope that the very lands might be acquired—Prices paid under useless enhancement of value due to hope of rise in the value of lands not acquired otherwise—Bases of value to be kept separate.

In land acquisition cases, the ordinary rule is that the burden is on the claimant to prove that the valuation by the Collector is sufficient but the burden varies according to the nature of the enquiry made by the Collector. If no evidence has been taken by the Collector and he has given no reasons to support this conclusion the burden is very lightly discharged, his mere *ipse dixit* being of little weight and no *prima facie* evidence of the correctness of the award.

Effects which any suggested land development may produce on prices must be excluded except to the extent to which it is shown that such speculations have actually entered into the market price of the land to be acquired:

Secretary of State for Foreign Affairs v. *Charlesworth Pilling & Co.* 1. followed.

Where in the hope that the very lands might be acquired, high prices have been paid for them the speculative value so attached is of little assistance in fixing the market value. But when it is known that there will be some scheme of development and it is hoped that the scheme will enhance the value of the lands not actually acquired, such enhancement in value must be taken into account.

The bases on which the value of the lands acquired is calculated are numerous but it is necessary to keep the basis actually adopted clear and not to shift the point of view.

Appeals from the orders of the District Court of Kurnool in referred cases Nos. 4, 1; 2, 3 and 10 of 1910 respectively.

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* A. Nos. 213, 261, 263 and 264 of 1912. 12th March 1914.

In A. 213 of 1912.

A. Sundaram for Appellant.

The Government Pleader for Respondent.

In A. 261 and 263, 264.

L. A. Govinda Raghava Aiyar and *A. Visvanatha Aiyar*, for Appellant.

The Government Pleader for Respondent.

The Court delivered the following.

Judgment:—We have been greatly assisted by the learned District Judge's careful analysis of all the evidence in the case. But there is nothing to show on what basis the calculation of the valuation of the lands is based.

The award of the Deputy Collector does not contain any reasons, and in our opinion the remarks of the Calcutta High Court in *Harish Chunder Neogy* v. *The Secretary of State for India in Council*[1] are applicable in this case. They say " Now the ordinary rule of *onus probandi* in these cases is that the claimant (who is a plaintiff) must prove that the valuation made by the Collector is insufficient. The theory is that the Collector in arriving at his award performs administrative and *quasi* judicial functions. He may take evidence and come to a conclusion on such evidence. The award under section 11 of the Act becomes final, if it is not challenged within a definite time before the tribunal of the special Judge, and that Judge, therefore fills the position to some extent of an Appellate Court. The burden of proof is thus ordinarily on the claimant in the Court of the special Judge, but the burden must vary according to the nature of the enquiry made by the Collector. If no evidence has been taken by the Collector, and if no reasons have been given in his decision to support his conclusion, the claimant has a very light burden to discharge. The mere *ipse dixit* of a Collector has very little weight, and is not *prima facie* evidence of the correctness of his award. Instances are not uncommon where the Collector has not given the grounds on which the amount of compensation was determined by him and the legal result of his failure to comply with the provisions of 19 (*i*) (*d*) of the Act is to make it incumbent on the Collector to justify before the special Judge, an award which is a mere *brutum*

1. (1907) 11. C. W. N. 117.

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fulmen. It seems to us that it is necessary to have some affirmative basis for valuing the land and it is not satisfactory to proceed on the ground that the claim put forward is manifestly too high and therefore to decide that the Deputy Collector's award must stand.

One point of general importance was alluded to at the outset with which we think it desirable to deal before we consider the evidence of value which is before us. It was argued that the probability that the Municipatity would acquire some lands near the town of Adoni was known long before the notification. This fact is alluded to by the learned District judge in paragraph 8 of his judgment and we accept it as a finding. This fact however does not alter the necessity for our valuing the land at its market value at the date of the publication of the declaration under the Land Acquisition Act, section 23 (1) first clause, notwithstanding that the Market value may have been affected by speculations as to land development in the town. Adopting the language of their Lordships of the Privy Council, speculations as to the effects which any suggested development may produce on prices must be excluded except to the extent to which it is shown that such speculations had actually entered into the market price of the land to be acquired, at the date of the declaration. *Secretary of State for Foreign affairs v. Charlesworth Pilling & Co.* [1] Where however the speculations are based on a hope that those lands may themselves be acquired which are in the market, from the prices paid for which land the market price of the land actually acquired is sought to be deduced, in such cases the speculative value so paid may for obvious reasons be of little assistance in arriving at the valuation of the market value of the lands acquired. But when it is known that there will be some scheme of development and it is hoped that the scheme will enhance the value of the lands not actually acquired, there can be no doubt that such enhancement in the value of the market rates must be taken into account.

The bases on which the value of the land acquired is calculated are numerous and it is necessary to keep the basis actually adopted clear, and not to shift the point of view. Two bases seem to have been alluded to in the argument. One is that of

1. (1900) I. L. R. 26 B. at p. 23.

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the prices fetched by the sale of lands in the same locality at or about the time of the declaration. The other basis is that of classifying the lands acquired as building sites or agricultural sites. The latter method of valuation seems to us to be inappropriate to the present case as we have no sure foundation on which to proceed after it has been determined whether the land ought to be classed as building site or not.

We therefore fall back on the former method of valuation the prices paid for similar lands, various documents were produced in the Court on behalf of the claimants. We agree with the learned judges that for the reason given by him all the documents which are passed by Hanchaji in favour of the previous purchasers are an uncertain guide not necessarily because they are fraudulent transactions but because the prices given for the plots sold were affected by many circumstances of too speculative a nature to be capable of being adequately weighed in arriving at a market value of the land.

But even assuming that all the documents to which we have referred above should be omitted from consideration as of too little value or of a value too difficult to be capable of being calculated, still there are some sales which cannot be neglected. We refer to the sales evidenced by exhibits *Z* and L and the sales of which evidence was given by the Collector. Out of these we consider Exhibits III, IV, and XXI to offer the safest guides that are available and after making all allowances for the circumstances referred to by the learned District Judge in paragraph 21 of his judgment and which have been relied upon during arguments before us, we think that the lands in survey No. 33/2, 33/1, 38 and 34 should be valued at a somewhat higher rate than the rates paid in the exhibits just referred to. These Survey Nos. are nearer to the town and more accessible. On this basis we think that a proper valuation for these survey numbers would be at Rs. 450 per acre.

As regards the other survey numbers, namely, survey Nos. 31 and 32, these are less accessible and they cannot be used as building sites until the road is completed which will be an expensive process as appears from page 120, line 42 of the printed documents. We consider that they should be valued at Rs. 300 per acre.

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These valuations do not include the 15 per cent. allowed for compulsory purchase under the Land Acquisition Act, sec. 23; nor the interest which must be added under section 34 both of which will be calculated on the excess awarded under our judgement.

As regards referred case No. 10 we see no reason to increase the amount.

There is no doubt that the claims in these cases have been extravagant and we think that these are proper cases for bringing section 27(2) of the Land Acquisition Act into play.

Taking into consideration all the circumstances, we make the following order as to costs without disturbing the order as to costs in the lower Court. Appeal No. 261 of 1912:—

We order that the appellant should pay half the costs of the Government in this Court.

Appeals Nos. 262, 263, and 213 of 1912. We think, stand on somewhat different footing. These were purchases by the claimants themselves in these cases for consideration somewhat nearer to their claims and though these purchases may not have been such as to afford a basis for valuation we think they should be borne in mind in awarding costs. There will be no orders as to costs of these appeals each party bearing his own costs.

Appeal No. 264 of 1912 will be dismissed with costs.

The decrees will be satisfied by the Secretary of State for India within 3 months of this date.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present.—Justice Sankaran Nair & Justice Ayling.

Suppan Asari and other. ... *Appellants.**

v.

Vannia Konar and others. ... *Respondents.*

Suppan Asari v. Vannia Konar.

Caste—Acquisition of rights by—Prescription—Customary right and right by prescription distinguished—Legal origin presumption of, from long user—Suit to establish right use a path on behalf of a caste—Maintainability of.

Where a right has been enjoyed time out of mind, a legal origin if possible will be presumed for such right. If the right claimed is with reference to a defined locality, then it is a customary right. But where the right is claimed on behalf of individuals or bodies politic or corporations then the right is said to be acquired by prescription. A caste is for this purpose recognised as a corporation; it is not

* S. A. 1618 of 1912. 19th February 1914

Sippan Asari v. Vannia Konar.

necessary that all the members of the caste should have been exercising the right, it is sufficient if the persons who did exercise the right claimed to do so on behalf of the caste. The right claimed in such a case must be distinguished from a public right which is vested in the general public and in respect of which a suit cannot be maintained in the absence of special damage.

Held accordingly, where a suit was brought by certain plaintiffs named on behalf of themselves and their caste, to establish their right to use a certain pathway and it was found that members of the caste had been using it from time out of mind.

That the caste had acquired a valid right by prescription and the suit as framed was sustainable.

Second appeal from the decree of the District Court of Tinnevelly in A. S. No 332 of 1911 presented against the decree of the Court of the District Munsiff of Tinnevelly in O. S. No. 253 of 1910.

T. R. Ramachandra Aiyar & *G. S. Ramachandra Aiyar* for Appellants.

M. D. Deva Doss & *K. S. Jayaram Aiyar* for Respondents.

The Court delivered the following.

Judgment:—The suit is brought by certain plaintiffs named on behalf of themselves, their caste, the Karnams, and the Villais. The lower courts have found that they have been using the path A.B. which runs on the northern side of the Kamatchiamman temple in Tinnevelly and leads to the bathing ghat and the temple for a long time and therefore they have acquired a customary right to use it. The main objection that is raised in second appeal is that a caste cannot acquire a customary right. It is argued that every custom must be local and must be alleged to be confined to a village or district. According to English law this may be so. But the question is when it is found that certain castes have been exercising a certain right whether a legal origin cannot be found for it. For it is clear law that when a right has been enjoyed time out of mind-in this case the origin of the right is not shown a legal origin if possible will be presumed. If the right is claimed with reference to a defined locality then it is a customary right.

But when the right is claimed on behalf of individuals or bodies politic or corporations, then the right is said to be acquired by prescription. A caste is for this purpose recognised as a corporation with civil rights. The cases show that properties are purchased for the caste and by the caste. Their right to hold and manage property has been recognised. Courts have often

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given effect to the resolution of the caste as a body as to the management of property. Suits have been brought on behalf of caste and against caste. All the members of the caste cannot be parties to such suits. Certain persons were allowed therefore to represent their under S. 30 of the Civil Procedure Code. In these circumstances we do not see why the members of a caste cannot acquire a right by long user. It may be true that all the members of the caste may not have been exercising the right, but it is sufficient if the persons who exercise the rights claimed to do so on behalf of the caste. In principle there is no difference between such acquisition and the acquisition of a right by a joint family or a corporation. We are therefore of opinion that on the facts proved in this case the castes represented by the plaintiffs must be held entitled to the right claimed by them.

The next contention is that the suit is not maintainable as the right claimed is a public right. The right that is found is a right existing in the castes represented by the plaintiffs and certain other castes. It is not a right vested in the general public. The castes as already stated must for this purpose be treated as corporations. The argument of the appellant's pleader assumes that for this purpose the exclusive right claimed by a caste is a public right. We disallow this contention also and dismiss the second appeal with costs of Respondents Nos. 11 to 14.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present Mr. Justice Wallis and Mr. Justice Oldfield.

Devaguptapu Kameswaramma... *Appellant** (*4th defendant*)

v.

Veddadi Venkatasubba Rao and others ... *Respondent* (*plaintiff* and *defendants 1 to 3 and legal representatives of the* 1st. *defendant*)

Kameswaramma v. Venkatasubba Rao

C. P. C 258 (old)—Surety for restitution—Execution against—Proviso inserted long after enactment—Interpretation—Value for—Hindu law—Decree against father—Not executable against properties allotted to the son, after partition.

Having regard to S. 253 of the old Code of Civil Procedure, a person who has stood surety for restitution in case the decree is reversed can be proceeded against in execution and the amount realised from him in the same manner as if he were the judgment debtor.

S. A. No. 1667 of 1912. * 29th April 1914.

Kameswaraamma v. Venkatasubba Rao.

Such an order though it may be executed against the family properties of the surety and his sons when they are in a state of union, cannot be executed against the properties in the hands of the son alloted to him at a *bona fide* partition taking place after the order but before the attachment. The analogy of S. 53 New Code cannot be used to justify such execution.

A proviso inserted long after the enactment of a section can afford little assistance in interpreting the section. Provisos are so often inserted *ex abundanti cautela* that, even when they are inserted at the time of the enactment their value as aids to interpretation is very little.

Thirumalai v. *Ramayyar*1 followed *Arunachellam* v. *Arunachellam* 2 dissented from.

Second Appeal from the decree of the Court of the Temporary Subordinate Judge of Rajahmundry in A. S. No. 42 of 1912 preferred against the decree of the court of the District Munsif of Peddapur in O. S. No. 285 of 1908.

A. Krishnasami Aiyar for Appellant.

Hon'ble B. N. Sarma for Respondent.

The Court delivered the following.

Judgment:—*Wallis J.*—In this case the present 2nd defendant obtained a decree for maintenance against the 3rd defendant and recovered in execution Rs. 637 which she was allowed to draw on giving security under S. 253 C. P. C. The surety was the 1st defendant, the father of the plaintiff. The decree was reversed by the High Court, and the 1st defendant as surety was ordered to pay the 3rd defendant the money which had been recovered from him by the 2nd defendant under the decree. The order was made under S. 253 C. P. C. which read with S. 583 C. P. C. was applicable to security for the performance of appellate decrees according to *Thirumalai* v. *Ramayyar.* 1 This decision has been questioned before us on the ground that it is inconsistent with the later decision in *Arunachellam* v. *Arunachellam* 2 decided by the same Judges. In that case the security had been given pending an appeal to the Privy Council, and it was necessary to invoke the aid of S. 610. C. P. C. to render S. 253 applicable to the case. The learned Judges apparently were of opinion that it might have been invoked but for the fact that in 1888 a special proviso had been introduced into S. 610, that, in so far as the order awards costs to the respondents, it may be executed against a surety therefor to the extent to which he has rendered himself liable in the same manner in which it may be executed

1. (1889) I. L. R. 13 M. 1. 2. (1891) I. L. R. 15 M. 208.

Kameswara-amma v. Venkata subba Rao.

against the appellant. With great respect it appears to me that what we have to look to is the meaning of Ss. 253 and 610 as originally enacted in 1877. The fact that the legislature eleven years later in 1888 inserted a proviso in S. 610 only shows the interpretation which the framers of the amendment were disposed to place upon the sections as they then stood. This interpretation is not authoritative, and in these circumstances the addition of the proviso is no reason for modifying the opinion which the Court would otherwise have arrived at on the construction of the original sections. Even where a proviso of this kind is introduced into a section at the time of enactment, it is often done *ex abundanti cautela* and it by no means follows that the operation of the section is affected thereby. In these circumstances I prefer to follow the earlier decision of the learned Judges in *Thirumalai* v. *Ramayyar*[1] which has been cited with approval in *Chettikulam* v. *Venkatachala Reddiar* v. *Chettikulam Kumara Venkatachala Reddiar* [2] more especially as this interpretation of the sections had been adopted in the express provisions of the present Code. I am therefore of opinion that the order was rightly made against the 1st defendant.

This order the 3rd defendant executed against property which fell to the plaintiff at a partition between himself and his father, the 1st defendant, after the date of the order against the father. The plaintiff objected that the properties were not liable to attachment, and on the rejection of his claim filed the present suit to establish his right. The defence in the lower Court was that the partition was collusive and inoperative, but the lower Courts rejected this contention and gave the plaintiff a decree.

In Second Appeal the point has been taken that, even supposing the partition to have been good, the present 3rd defendant is none the less entitled to execute the decree against the plaintiff, to the extent of the joint family property which has come to him, the order being equivalent to a decree which he obtained against the plaintiff's father before the partition. The order under S. 253, may, I think, be considered as equivalent to a decree against the father, and it appears to be now settled in this

1. (1889) I. L. R. 13 M. 1. 2. (1905) I. L. R. 28 M. 377.

Kamesvaramma v. Venkatasubba Rao.

court that a suretyship liability such as this, is one which a Hindu son is under a pious obligation to discharge.

I think it is also clear that plaintiff as a Hindu son is liable for the debt to the extent of the joint family property which came to his hands at partition *Ramachandra Padayachi* v. *Kondayya Chetty* [1]. The only question then is, is a decree for such a debt obtained against the father before partition executable after partition against the son and the joint family property alloted to him. In *Krishnasami Konan* v. *Ramasami Ayyar* [2], where the father had contracted the debt before partition, and a suit had been brought and a decree passed against him after partion, it was held that the decree could not be executed against the properties which had fallen to the son on partition, because the principle upon which the son cannot object to ancestral property being seized in execution for an unsecured personal debt of the father is, that the father under the Hindu law is entitled to sell on account of such debt the whole of the ancestral estate." This necessarily implies that at the time the property is attached it remains the undivided property of the father and the son. The same view has been taken under very similar circumstances by *Miller & Krishanaswami Aiyer* JJ. in *Lakshmana chettiar* v. *Govindaraju-lu Naidu* [3] —see also *Rathna Naidu* v. *Aiyanachariar*, [4]. It is sought to distinguish these cases on the ground that the order equivalent to a decree was made against the father in this case before the date of partition; but this circumstance does not appear to make any difference, as, at the date of execution, the property now in question had ceased to be joint family property, and the cases refered to on the other side. *Jagabhai Lalubhai* v. *Bhukandas Jagjivandas* [5]. *Deendyal Lal* v. *Judgeeb Narain Singh* [6]; *Suraj Bunsi Koer* v. *Sheo Proshad Singh* [7] *Nanomi Babuastin* v. *Modhun Mohun* [8] and *Govind v. Sakharam* [9] were all cases in which the property remained joint and so subject to alienation by the father in satisfaction of his debt. Lastly it had been attempted to base an argument on S. 53 of the present Code which provides, that for the purpose Ss. 50 and 52. property in the

1. (1901) I. L. R. 24 M. 555.
2. (1899) I. L. R. 22 M. 519.
3. (1910) 8 M. L. T. 349.
4. (1908) 18 M. L. J. 599.
5. (1886) I. L. R. 11 B. 37.
6. (1877) 4. I. A. 247.
7. (1879) 6. I. A. 88.
8. (1885) I. L. R. 13 C. 21.
9. (1904) I. L. R. 28. B. 383.

Kamesvaraamma v. Venkatasubba Rao.

hands of a son which under the Hindu Law is liable for the payment of the debt of his deceased father in the respect of which a decree has been passed shall be deemed to be property of the deceased father which has come to the hand of his son as his legal representative. This stationary fiction however only applies to the case of a deceased father, and we should not be justified in extending it to a case where father is still living or in inferring, as has been suggested, that as the decree could under the section be executed against the property in question if the father was dead, it must be *a fortiori* be executable against the same property when the father is alive. The answer is that the legislature has not made any such provision. In the result the second appeal fails and is dismissed with costs.

Oldfied J :—I concur.

PRIVY COUNCIL.

Present:—Lords Dunedin and Moulton, Sir John Edge and Mr. Ameer Ali.

On Appeal from the High Court at Calcutta.

Peter Charles Ernest Paul and another ...*Appellants.**

v.

William Robson and others ...*Respondents.*

Peter Charles Ernest Paul *v.* William Robson.

Easement—Right to light—Infringement of—Test—Actionable Nuisance—No right to amount of light enjoyed—Limited to quantity required for inhabitancy or business.

By the enjoyment of light for a period of twenty years, a person does not acquire an indefeasible right to the enjoyment of a like amount of light in the future; his right is limited to that quantity of light which is required for the ordinary purposes of inhabitancy or business of the tenement; in other words to constitute an infringement of the right to light, the obstruction complained of must amount to an actionable nuisance.

Colls v. *The Home* and *Colonial Stores, Ld.* (1) approved and followed.

Jolly v. *Kine* (2) explained.

Appeal from a Judgment and Decree of the High Court, dated Aug. 1, 1911 on an appeal from a Judgment and Decree of the same in its ordinary original jurisdiction, dated March 29, 1911.

The facts of the case are sufficiently set forth in Their Lordships' Judgment.

Upjohn, K. C. and *Hudson, K. C.* with them *Vernon* for the appellants contended that the evidence proved that the respondent's new buildings caused a nuisance or illegal obstruction to the appellants' ancient windows. The appellants' premises had in consequence been rendered to a substantial degree less fit for the purpose of business or occupation and been sensibly interfered with according to the ordinary notions of mankind in point of affording comfort and convenience. The question whether sufficient light was left for the purpose of a dwelling house and place of business was not the test to be applied in order to ascertain whether the respondents' building constituted an actionable nuisance.

Reference was made to *Colls* v. *The Home* and *Colonial Stores, Ltd.* [1] and *Jolly* v. *Kine* [2].

De Gruyther, K. C. and Dunne appeared for the respondents, but were not called on.

* 11th May 1914.

1. (1904) A. C. 179.
2. (1907) A. C. 1.

Peter Charles Ernest Paul v. William Robson.

The Judgment of Their Lordships was delivered by

Lord Moulton: The action in which the present appeal is brought is an action in which the appellants sued the respondents for infringement of certain rights of light possessed by them in connection with premises known as 7, Esplande, East, Calcutta, of which they owned the freehold. The respondents had erected a building known as 8, Esplanade, East, Calcutta, lying to the east of the appellants' premises, and so situated that the western walls of the respondents' buildings were parallel to and at a distance of 17 feet from the eastern wall of the appellants' building. The ground on which the respondents' building was erected had for more than 20 years previously been occupied by much lower buildings, and it is conceded that the appellants had acquired rights of light thereby for the windows on the east side of their premises. The new buildings of the respondents greatly exceed in height the former buildings upon the site and decreased the amount of light coming to the eastern windows of the appellants, and it is in respect of this interference with the access of light to their windows that the appellants brought the action.

The action came on for trial with witnesses before the Hon. Mr. Justice Stephen, sitting as a Judge of the High Court of Judicature at Fort William in Bengal, in its ordinary civil jurisdiction, and on the 29th day of March 1911 he gave judgment dismissing the action. An appeal was brought from that judgment to the High Court of Judicature at Fort William in Bengal in its appellate jurisdiction, and on the 1st day of August 1911 judgment was delivered by that Court dismissing the appeal. It is from this judgment that the present appeal is brought.

Both in the Court of First Instance and in the Court of Appeal the facts of the case are dealt with in detail, and clear findings are given on all relevant points of fact. Their Lordships can find no material difference between the views taken by the two Courts on these points of fact, though the expressions used may not be in all cases identical. Their Lordships therefore would feel justified in holding, if it were necessary that this is a case of concurrent findings of fact. But in truth the grounds of appeal do not relate to these findings of fact, but to the question whether the Courts below have taken the proper view of the legal rights of the appellants, and whether accordingly, the test which they applied as to whether those rights had

Peter Charles Ernest Paul *v.* William Robson.

been infringed was the correct one. This is a pure question of law, and it was admitted by counsel for the appellants that it practically turns upon the interpretation to be given to the well-known decision of the House of Lords in the case of *Colls* v. *The Home and Colonial Stores, Limited* [1], when considered in connection with the later decision of the House of Lords in *Jolly* v. *Kine* [2].

Their Lordships do not consider that it is either necessary or profitable to go into the history of the divergent views in respect of the nature and extent of rights of light acquired by prescription that prevailed in the Courts prior to the decision in *Colls' case.* It suffices to say that one stream of authorities gave countenance to the view that by the enjoyment of light for a period of 20 years, there could be acquired an indefeasible right to the enjoyment of a like amount of light in the future. The conflicting stream of authorities countenanced the view that nothing constituted an infringement of rights of light which did not amount to an actionable nuisance, so that the amplitude of previous enjoyment was no measure of the rights acquired thereby. This conflict of views was fully recognised by the noble Lords who took part in the decision of *Colls's case,* and there can be no doubt that it was their intention to decide between them, and to lay down the law in such a manner as to prevent uncertainty in the future.

Mr. Justice Stephen takes as expressing the law laid down by this decision the following quotation from the opinion of Lord Davey in that case.

"The owner . . . . of the dominant tenement is entitled to the uninterrupted access through his ancient windows of a quantity of light the measure "of which is what is required for the ordinary purposes of inhabitancy or business "of the tenement according to the ordinary notions of mankind . . . . The "single question in these cases is still what it was in the days of Lord Eldon— "whether the obstruction complained of is a nuisance." ?

And the Court of Appeal although they do not so directly base their judgment on the above passage in Lord Davey's opinion, appear to their Lordships to have substantially taken the same test. But in their Lordships' opinion it is not necessary to examine minutely the verbal differences between the expressions used in the Court of Appeal and by the Judge of First Instance.

1. (1904) A. C. 179. 2. (1907) A. C. 1.

Peter Charles Ernest Paul v. William Robson.

They accept in full the finding in fact of the Judge of First Instance, and they are of opinion that he has consistently applied to them the legal test above formulated. The only question therefore is whether it accurately formulates the law on the subject.

It is evident on reading the opinion of Lord Davey that he intended the passage to be a precise formulation of the rights of a dominant tenement in respect of ancient lights, and his opinion was formally accepted by Lord Robertson who also took part in the decision. The opinion of the Lord Chancellor in that case is equally clear on the essential points that the easement acquired by ancient lights is not measured by the amount of light enjoyed during the period of prescription, and that there is no infringement unless that which is done amounts to a nuisance. It has been suggested that a different view is to be found in the opinions of Lord Macnaghten and Lord Lindley, but although there are passages in these opinions which might if they stood alone indicate that those noble Lords considered that to some extent the amount of light enjoyed in the past might influence the rights acquired for the future, there is no reason to think there was any intention on the part of those noble Lords to differ from the conclusions of their colleagues. It must be taken therefore that the House of Lords adopted the formulation of the law given by Lord Davey as above mentioned.

But if any doubt remained on the point it is in their Lordships' opinion set at rest by a consideration of the subsequent decision of the House of Lords in the case of *Jolly* v. *Kine* [1]. In that case Mr. *Justice Kekewich* had found as a fact that the obstruction amounted to a nuisance; but in the course of his judgment said that the room affected, was "still a well-lighted room." He gave judgment for the plaintiff. On appeal to the court of Appeal there was a division of opinion among the judges. *Romer, L.J.*, held that under the decision in *Colls's case* the finding that it was still a well-lighted room was fatal to the plaintiffs' claim. *Vaughan Williams* and *Cozens Hardy L. JJ.*, held to the contrary. On appeal to the House of Lords their Lordships were equally divided and accordingly the appeal was dismissed. But this division of opinion was not due to any doubt as to the law to be applied.

1. (1907) A. C. 1.

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The Lord Chancellor gives his opinion on the law as laid down in *Colls's case* [1] in the following words:—

"The right of the owner or occupier of a dominant tenement to light is based "upon the principle stated by Lord Hardwicke in 1752, in *Fishmongers' Company* "v. *East India Company*, that he is not to be molested by what would be equiva-"lent to a nuisance. He does not obtain by his easement a right to all the light "he has enjoyed. He obtains a right to so much of it as will suffice for the "ordinary purposes of inhabitancy or business according to the ordinary notions of "mankind having regard to the locality and surroundings. That is the basis on "which the decision of this House proceeded.

Lord James of Hereford concurred in the judgment delivered by the Lord Chancellor.

These were the judgments of the two noble Lords who were in favour of dismissing the appeal. On the other hand *Lord Robertson* was of opinion that the appeal should be allowed and in his opinion says:—

"I adhere, as I did in *Colls's case*, to the definition given by Lord Davey in entire "accordance with the judgments of the other noble and learned Lords. According "to that definition the quantity of light to which right is acquired in 20 years is "what is required for the ordinary purposes of inhabitancy or business of the "tenement according to 'the ordinary notions of mankind.'"

Lord Atkinson, who was the other member of the Court, was also in favour of allowing the Appeal, and referring to the decision in *Colls's case*, he says:—

"It would appear to me that that case established the principle that there must "be an invasion of the legal right of the owner of the dominant tenement sufficient to "amount to a nuisance in order to give him a right of action, and that as long as "he receives through the windows of his dwelling-house, or in the case of a particular "room in his dwelling-house, through the windows of that room, an amount of "light which, to use the words of James, L.J., in *Kelk* v. *Pearson* is 'sufficient "according to the ordinary 'notions of mankind for the comfortable use and "enjoyment' of his dwelling-house, or of the room in it, as the case may be, no "nuisance has as regards him been created, and no legal wrong has been inflicted "upon him."

And although he does not expressly repeat the well-known passage from Lord Davey's opinion in *Colls's case* he shows by the language which he uses that he thoroughly agrees with it, and says that to him it appears to be of general application.

In the judgment of the House of Lords in *Jolly* v. *Kine*, [2] there is therefore an authoritative exposition of the decision in *Colls's case*,[1] and it is established that the law as formulated by

1. (1904) A. C. 179. 2. (1907) A. C. 1.

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Lord Davey is the law laid down by that decision. It is somewhat remarkable therefore that counsel for the appellants should have sought to treat the decision in *Jolly* v. *Kine* [1] as throwing some doubt upon the interpretation of the decision in *Colls's case*,[2] operating, if such an expression could be used, to weaken it in the direction of directing that regard should be had to the extent of previous enjoyment of light. The only explanation of such a view is that the appeal was in the end dismissed, inasmuch as the House was equally divided. But this was in no way due to any difference of opinion as to the law, but to the fact that the Lord Chancellor felt himself entitled to disregard the finding that the room was "still a well-lighted room," in the sense which those words would naturally convey and to hold them as meaning that it would have been considered to be well-lighted "according to the standard of a crowded city." His Lordship was led to this conclusion by passages in the evidence and the context of Mr. Justice Kekewich's judgment. It was on this ground alone that he was in favour of dismissing the appeal, and therefore the actual result in that case has no bearing on its effect as an authoritative explanation of the law laid down in *Colls's case* [2].

Their Lordships are therefore of opinion that the learned Judge at the trial took the proper test as to whether or not there had been an infringement of the rights of the appellants and that he applied it correctly to the facts of the case. They are therefore of opinion that his judgment was right and that the Court of Appeal was right in affirming it, and they will humbly advise His Majesty that the present appeal should be dismissed with costs.

Solicitors for Appellants: *Westbury, Preston and Slavridi.*

Solicitors for Respondents: *Watkins and Hunter.*

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1. (1907) A. C. 1.

2. (1904) A. C. 179.

PRIVY COUNCIL.

Present:—Lords Shaw, Moulton and Mr. Ameer Ali.

On Appeal from the High Court at Calcutta.

Bijoy Gopal Mukerji and others ... *Appellants**

v.

Girindra Nath Mukerji and others ... *Respondents.*

Bijoy Gopal Mukerji *v.* Grindra Nath Mukerji.

Hindu Law—Necessity—Alienation by a Hindu widow—Ijara—Consent of reversioners—Acquiescence on the part of reversioners—Family settlement.

Where it appeared that at a time when the widow was not in possession though she had established her right after a long litigation and there was danger from the growth of adverse rights in actual possessors of the land she had granted an Ijara for 60 years in favour of two of the reversioners and a Dar Ijara some time after in favour of the other, the effect of which was that the property was divided up by her among the reversioners reserving for herself a small income as maintenance and on the death of one of the grantees of the Ijara, his sons continued in enjoyment till the death of the widow which took place 11 years after.

Held, in a suit by them to set aside the ijara as an unauthorised interference with their reversionary interest,

agreeing with the High Court, that the arrangement was dictated by necessity and was binding on the estate.

That there was no reason to hold that the settlement by which peace for 30 years was brought into the family was an unjust arrangement thrust upon a helpless widow by her influential relatives, that the fair inference from their conduct was that they believed that the arrangement had been made in good faith and under circumstances of necessity.

It is a feature of the law as administered by the Board to attach great weight to the sanction by expectant reversioners of an alienation of property by a Hindu woman as affording evidence that the alienation was under circumstances which rendered it lawful and valid.

Appeal from a Judgment and three Decrees of the High Court dated June 4, 1908 reversing a Decree of the Subordinate Judge of Nuddia dated Nov. 28, 1898.

On the death of the widow Tarini the Appellants brought a suit against the heirs of Ijaradars and Dar-Ijaradars to have the Ijaras and Dar-Ijaras created by the said widow declared inoperative against them in 1897 in the Court of the Subordinate Judge of Nuddia. The Subordinate Judge decided in favour of the Appellants, holding that there was no necessity on the part of the widow to justify the alienation in question. On appeal to the High Court in 1903 it was held that the suit was barred by limitation and the appeal dismissed. An appeal was then preferred to the Judicial Committee which remitted the appeals to the

* 2nd February 1914

Bijoy Gopal Mukerji *v.* Grindra Nath Mukerji.

High Court for further consideration on the merits. In 1908, the High Court delivered its Judgment holding that the Ijara was part of a family arrangement intended for the benefit of the estate and which did in fact benefit the estate; that the widow and other persons interested might mutually agree that the property should be managed in a particular way and that a Court of equity would not set aside such an arrangement unless it seriously prejudiced the parties to it or their successors. The plaintiffs were therefore held not to be entitled to possession till the expiry of the full period of 60 years. Against this order of the High Court the plaintiffs appealed to the Privy Council.

De Gruyther K. C. (*with him Eddis*) on behalf of the Appellants contended that there was no legal necessity for the execution of the ijara which was therefore not binding on the plaintiffs after the death of Tarin, the widow.

[*Lord Shaw*: You cannot take necessity in the abstract.]

[*Lord Moulton*: I don't think it means *de facto* necessity. You must take the whole circumstances of the case into account.]

A Hindu widow executing an ikrarnama in favour of her daughter's son, then the apparent reversionary heir, in which she transferred to him the management of her husband's property but did not surrender her widow's estate therein could not bind another daughter's son born after the execution of the said ikrarnama far beyond her lifetime.

[*Lord Moulton*: It is absurd on the face of the document. She purported to give something which she had not got.]

There is no other reason which the Hindu Law recognises as binding the reversioners after the widow's death. The plaintiffs did not ratify or confirm the said the ijara in respect of any part of the lands comprised therein. Such a family arrangement as forms the basis of the decision of the High Court was not set up by the defendants nor raised at the hearing of the case.

Reference was made to: *Behari Lal* v. *Madho Lal*[1], Maynes' Hindu Law, Sec. 604, P. 804.

Sir Robert Finlay, K. C. and Loundes appeared for the Respondents, but were not caled upon.

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1 (1892) L. R. 19 I. A. 30.

Bijoy Gopal Mukerji v. Grindra Nath Mukerji.

The Judgment of their Lordships was delivered by

Lord Moulton:—The substantial question in this Appeal is the validity of an Ijara executed on the 7th September 1863, for a term of 60 years, by a Hindu widow named Sayamoni Debi, under circumstances which it will be necessary to refer to in some detail.

Sayamoni Debi was the widow of Chandra Bhusan Mukerji. Her husband died in 1832 without leaving any issue, making her his sole heiress. The property consisted chiefly of landed property of considerable value.

Sayamoni was a Purdanasheen lady and probably not very capable of managing a large estate. She appears to have been dispossessed of the property by one of her husband's relatives, Baman Das Mukerji, and was compelled, in 1844, to bring a suit against him and his two brothers, Gouri Pershad and Annoda Pershad, to recover it. This litigation lasted till 1858, when on appeal to his Majesty in Council, the rights of Sayamoni to the estate of her husband were finally established. But although this was the case, it is evident that she did not thereupon obtain possession of the property. Further difficulties were raised and much of the property was threatened with growth of adverse rights in the actual possessors of the land, who refused to pay rent under the pretext that the title had not been settled, and seeing that, prior to 1858, adverse possession against a widow ranked as adverse possession against the reversioners, there can be no doubt that the whole estate was in very serious peril.

While this state of things was still continuing the Ijara now in question was executed by the widow. Although at this distance of time it is impossible to ascertain with accuracy all that then happened, it is evident that this Ijara was part of a general family settlement whereby the widow divided up the family property amongst the various reversioners, reserving to herself only a comparatively small annual income which may fairly be looked on as representing maintenance. The Ijara itself was granted to Annoda Pershad and Saroda Pershad, who was the son of Gouri Pershad who had died in the interval. The third brother, Baman Das Mukerji, did not directly take any interest under the Ijara, but in October 1863 a Dar-Ijara was granted to his son of a portion of the property, and we find also that a large sum due

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from him on account of mesne profits was remitted by Sayamoni, so that it is clear that all branches of the family shared in the settlement.

If the term of the Ijara had been for the life of Sayamoni, no question could have arisen such as is now before their Lordships. But doubtless from the necessities of the case, in order to facilitate the practical settlement of the property so as to obtain its full value, the term was made for a fixed period of 60 years. Inasmuch as the lady was 42 years of age at the date when the Ijara was granted, it is evident that all the parties realised that the term would extend beyond her lifetime, and thus affect the rights of the reversioners whosoever they might happen to be. So far as the persons are concerned who then represented the reversion, it is clear that all this was done with their consent. They all took large interests under the arrangement, and have continued to enjoy them so long as they lived.

One of the parties who principally benefited by the Ijara was Annoda Pershad, who was one of the actual lessees under the Ijara. He died in 1882, so that Sayamoni (who died in 1893) survived him 11 years. The Appellants are four sons of Annoda Pershad, and on the death of Sayamoni they became entitled directly to share in any family property of which she was the life tenant, and they have brought this action to set aside the Ijara, on the ground that it was an unauthorised interference by the widow with the reversionary interest which did not belong to her. The Court below, in a careful and well reasoned Judgment, have decided that, on the facts of the case, the arrangement of which the Ijara formed part was in truth dictated by the necessities of the case, and that the choice of the term of 60 years as the term of the Ijara was made for the benefit of the estate and did not injure anyone.

Their Lordships agree with this Judgment. They are of opinion that the case depends entirely on the facts, and that it raises no new question of law as to the powers of Hindu widow to deal with family property in case of necessity with the consent of the then present reversioners, and they are, therefore of opinion that the appeal fails.

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Counsel for the Appellants laboured to show that the so-called settlement by which peace for 30 years was brought into the family and, in their Lordships' opinion, the family property was in fact saved, was an outrageous and flagrantly unjust arrangement forced upon a helpless Purdanasheen widow by her influential relations in whose hands she was, and that any person either at the time or since must have known from its terms that it had been extorted by duress or engineered by fraud. Their Lordships are of opinion that Counsel entirely overlooked the evidence against this contention which is derived from the conduct of his own clients. From the year 1882, when Annoda Pershad died to the year 1893 when Sayamoni died, they themselves took the benefit of this arrangement which they now stigmatise as a gross fraud. It is suggested on their behalf that they thus made themselves participants in it solely because it was profitable so to do. Their Lordships decline to believe them to be as unscrupulous as they desire to be considered. As against them it is a fair inference from their conduct that they believed that the arrangement had been made in good faith, and under such circumstances of necessity as would give it validity according to Hindu law, and as it has always been a feature of Hindu law as administered by this Board to attach great weight to the sanction by expectant reversioners of an alienation of property by a Hindu woman as affording evidence that the alienation was under circumstances which rendered it lawful and valid, their Lordships in this case consider that the conduct of the Appellants themselves during those years affords evidence upon which the Respondents are entitled to rely.

Their Lordships will therefore humbly advise His Majesty that this appeal should be dismissed. The Appellants will pay the costs.

Solicitors for Appellants: *Sanderson, Adkin, Lee and Eddis.*

Solicitors for Respondents: *T. L. Wilson and Co.*

PRIVY COUNCIL.

Present:—Lord Shaw, Sir John Edge and Mr. Ameer Ali

(On Appeal from the Court of the Judicial Commissioner of Oudh.)

Thakur Sheo Narain Singh and others ... *Appellants.**
v. (*Plaintiffs*)
Thakur Bishunath Singh and another ... *Respondents.*

Thakur Sheo Narain Singh *v.* Thakur Bisunath Singh.

Award—Construction—"No right to demand accounts"—Division "of cash"—Claim for share of profits under usufructuary mortgage, excluded—Equitable set-off—Amount made payable under award—Plaintiffs' claim for share of joint income—Set off.

Where in an award by which the plaintiffs and defendants who were members of an undivided family became divided it was stated that the parties had put in written statements saying that they had divided the cash, &c., that they had understood the accounts among themselves and that they had no right to demand accounts from one another, in a suit by the plaintiffs for their share of the receipts under a certain usufructuary mortgage by some of the defendants previously to the award alleging that the award had omitted to deal with them.

Held that the term cash clearly referred to those receipts that in any event the stipulation in the award, *viz.*, that "no co-sharer had any right to demand accounts" covered the claim and excluded it.

The arbitrator had found certain sums due to the defendants and had declared that they should be paid out of the joint income.

Held that the defendants were entitled to an equitable set-off in respect of the said amounts against the plaintiffs claim for their share of the joint income.

Appeal from a Judgment and Decree of the Court of the Judicial Commissioner, dated July 26, 1907 allowing the respondents' appeal against an order of the Subordinate Judge of Rai Bareili, dated June 5, 1907 and dismissing the appellants' suit against them for an account and other reliefs.

Thakur Pirthi Singh had three sons all of whom formed a joint Hindu family. On the death of their father, they decided to separate and appointed Syed Fida Hosain to act as an arbitrator to divide the joint property and settle any disputes arising between them. In 1895 the award was made. Soon after Gur Baksh Singh, appellant's father died. Ignoring the award, the appellants brought a suit for an account of the joint property and ⅓ share in certain immovable property and moneys lent on mortgage. The respondents pleaded the finality of the award and further pointed out that the appellants received more than their share in the joint property. The Subordinate Judge dismissed the appellant's claim.

* 31st October 1913.

Thakur Sheo Narain Singh v. Thakur Bisu-nath Singh.

On appeal the Judicial Commissioner confirmed the findings of the lower Court holding that the award was final by which no right to demand an account from others of the profits enjoyed prior to the date of the award in respect of an usufructuary mortgage was conferred on any of the brothers, and that a sum of Rs. 5,827-2-1 on account of appellant's share in the joint debts should be regarded as set off against Rs. 5900 which they (respondents) were entitled to appropriate to themselves out of the appellant's share of the joint income by virtue of the award. Against these findings an appeal was preferred to the Judicial Committee, by the Plaintiffs Appellants.

De Gruyther K. C. and Dube on behalf of the appellants urged that the findings of the Court of Appeal were erroneous inasmuch as it placed a wrong construction on the award. The appellants were entitled to claim the sum which was realised before the date of the award. There could be no set-off in the present case. Interest ought to have been allowed at the rate of 12 per cent. per annum as agreed upon by the parties.

Sir E. Richards K. C. and *Grey* on behalf of the respondents contended that the award was binding on the appellants. There were concurrent findings of both Courts in India that a sum of Rs. 5827-2-1 was owing to the appellants as their share of respondent's valuations. No interest had been allowed to the respondents, on the sum payable to them under the award, out of the joint income and therefore it was not equitable to allow an interest to the appellants alone.

The Judgment of Their Lordships was delivered by

Mr. Ameer Ali: This is an Appeal from a Judgment and Decree of the Court of the Judicial Commissioner of Oudh, dated the 26th of July 1909, and arises out of a suit brought by the Plaintiffs-Appellants in the Court of the Subordinate Judge of Rae Bareili against the Defendants-Respondents for an account of the joint money-lending business and other reliefs. Although a number of questions appear to have been discussed in the courts in India the only two argued on this appeal depend on the construction of certain provisions of an award made on the 5th August 1895, which admittedly put an end to the joint status of the family, and on the applicability of the principle of equita-

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ble set-off to the facts of this case in so far as one of the points for determination is concerned.

The Plaintiffs are the sons of one Gur Bakhsh Singh, who with his brothers, the Defendants-Respondents, formed a joint Hindu family. On his death disputes appear to have arisen between the nephews and uncles which were referred to the arbitration of one Syed Fida Husain, who made the award referred to above. It is a very able document and appears to deal with the subjects of dispute in concise and perspicuous form. After reciting that "in every way the executants gave the Arbitrator "complete power for decision, and engage themselves and their "representatives to be bound by whatever decision would be "passed by him," the document proceeds to state:—

> "But on the 31st July 1895 each of the three parties in his statement record- "ed by me stated that after the execution of the agreement all the three brothers "have divided among themselves all the moveables consisting of cash and kind, "ornaments, clothes, and household goods, and that therefore there is no necessity "for filing list thereof or giving any decision thereon; that the sum of Rs. 3,150 "on account of deficiency in the price of ornaments and Rs. 2,500 which is the "personal money of Thakur Bishunath Singh contributed to the joint business, "total Rs. 5,650 is to be paid to him; that the manner in which this money is to "be paid has to be decided; that they have understood the accounts among "themselves and that now no co-sharer has any right to demand accounts from "another; that only the grain kept for home consumption and for dealings with "the tenants, the agricultural implements, cattle, horses, and elephants are still "undivided."

The Plaintiffs seek in the present suit for an account of the debts and monies realised by the Defendants during their management of the joint money-lending business, and in list C attached to the Plaint they specify particularly the debts in respect of which the claim for account is directed. The important items in the list relate to a usufructuary mortgage dated the 16th of June 1883 executed by one Mohammed Askari in favour of Bishunath Singh as representing the joint family. The principal sum secured by the mortgage was Rs. 32,000; and it was provided that should the mortgagor fail to discharge the principal and interest within the period of 14 years, the term of the mortgage, the mortgage debt would become discharged at the end of that period by the receipt of the usufruct. Under this covenant the first defendant was receiving the usufruct of the mortgaged property towards the liquidation of the principal and interest.

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At the time of the award two years were still outstanding in respect of this mortgage.

There is no reference to the award in the Plaint, but the Defendants contend that under the terms and intent of the Award the Plaintiffs are not entitled to the relief they seek. The first question for determination, therefore, is whether having regard to the declaration contained in the award the plaintiffs are or are not precluded from asking for an account of monies realised previous to the date of the award.

The Subordinate Judge dismissed the Plaintiffs' claim in this respect on the ground that in his judgment it was barred by limitation. The Judicial Commissioners proceeding on the Award, have held that it seemed to them sufficiently clear from the provisions of the document that the arbitrator did not intend to confer on any one of the brothers the right to demand from the others an account of the profits enjoyed to the date of the Award under Mohammed Askari's usufructuary mortgage. Their Lordships think that the conclusion at which the Appellate Court in India has arrived is correct.

The word "cash" in the passage quoted clearly refers in their opinion to all monies received by the parties before the statement was made to the Arbitrator, and in any event it appears to their Lordships that the stipulation in the Award that "now no co-sharer has any right to demand accounts from another" covers this claim and excludes it.

The second question relates to a sum of Rs. 5,900 or thereabouts regarding which the Defendants claim a set-off against the amount decreed in favour of the Plaintiffs on other items.

The Arbitrator had found that two sums of Rs. 5,650 and Rs. 1,000 respectively were payable to the Defendant Bishunath and had declared that it should be "paid out of the joint income." And he added that he would specify later on "the joint income."

Similarly he had found that Rs. 5,150 was payable to Jadunath. Bishunath and Jadunath, each being liable to the other for a certain share of these debts, became entitled to receive from the Plaintiffs, the sons of Gur Bakhsh, Rs. 5,900. Defendants contend that they are entitled to a set-off as regards this sum against the amount decreed to the Plaintiff on account of "the joint

Thakur Sheo Narain Singh. v. Thakur Bisunath Singh.

income" of the parties. The Subordinate-Judge refused to give effect to the Defendants' contention, and his view was upheld at one stage of the case by the Court of the Judicial Commissioner. At a subsequent stage when the case came back to the Appellate Court after the remand it had ordered for certain enquiries, the learned Judges who heard the Appeal modified the view previously expressed, and considered that having regard to the circumstances of the case, the Court would be justified in applying the principle of equitable set-off to the Defendants' claim. Their Lordships concur generally with the reasons given by the learned Judges for coming to this conclusion.

In the result their Lordships think that this Appeal should be dismissed with costs, and they will humbly advise His Majesty accordingly.

Solicitors for appellants :—*Barrow, Rogers & Neville.*

Solicitors for respondents :—*T. L. Wilson & Co.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Miller and Mr. Justice Tyabji.

Thalagara Ramanne and others ... *Appellants.**

v.

Kalagare Gangayya and others ... *Respondents.*

Thalagara Ramanne v. Kalagare Gangayya.

Hindu Law—Widow—Sale by—Major portion of consideration binding—Bona fide—Price not unreasonably low—Sale upheld.

Where the major portion of the consideration for a sale by a Hindu Widow was found to be binding on the estate and it was also found that the sale was *bona fide* and the price paid was not unreasonably low.

Held, that the sale should be upheld *Felaram Roy* v. *Bagalanand* (1) followed.

Second appeal from the decree of the District Court of Kistna at Masulipatam in A. S. No. 222 of 1910 preferred against the decree of the Court of the Subordinate Judge of Kistna at Ellore in O. S. No. 42 of 1908.

T. V. Sheshagiri Aiyar and *T. Ramachandra Rao* for Appellants.

K. Narayana Rao for Respondents.

The Court delivered the following

Judgment :—The District Judge finds that out of the sum of Rs. 1300 the price paid for the property, Rs. 1022 was

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* S. A. 1429 of 1912. 21st October 1913.

1. (1910) 14 C. W. N. 895.

Thalagara Ramanne v. Kalagare Ganagayya.

to pay off a debt or debts which the widow was legally justified in paying out of the corpus of his son's estate, and that as regards the balance of Rs. 278, there was no justification for obtaining that money by sale of the land. The District Judge also finds that both sales were *bona fide* transactions and that the prices paid were not unreasonably low. These findings we accept but we do not think they justify the decree which the District Judge has made.

The sale Exhibit IV for Rs. 700 is clearly wholly good as found by the District Judge and the reversioners have no claim to recover the property. The only ground suggested in support of the decree is inadequacy of price but the District Judge's finding is that the price was not unreasonable.

As regards the sale for Rs. 600, the sum of Rs. 322 is binding, so to phrase it, on the reversion and Rs. 278 is not binding; but the sale was *bona fide* and the purchaser is, we think, entitled to retain the land.

We accept the view taken of this question in *Felaram Roy* v. *Bagalanand Banerjee* [1] and think that the right decree as regards the second sale will be one which permits the purchaser to retain the land; we need not consider the question whether the reversioners have a right to recover the sum of Rs. 278 because that question was not argued and it was stated by Mr. Seshagiri Aiyar if we accept the District Judge's finding his clients were willing to pay that amount to retain the land.

We leave that question open for further consideration should it arise.

The decree will, therefore, be that the suit be dismissed with costs throughout as against defendants Nos. 1 to 14 and 17 and 18 and that if the 15th defendant do not within 3 months pay the amount of Rs. 278 with interest at 6 P. C. per annum from the date of the death of the widow, *i.e.*, on 24—1—00, the plaintiff be at liberty to sell the property covered by Exhibit III for the amount but if the payment is made within 3 months the plaintiff's suit will stand dismissed against the 15th and 16th defendants also. The 15th defendant will pay his own costs but not the plaintiffs. The memorandum of objections is dismissed with costs.

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1. (1910) 14 C. W. N. 895.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Tyabji.

Venkatasubbaiyar ... *Appellant** (*Plaintiff*).

v.

Subbarathinam Aiyar, and others *Respondents* (*Defendants*).

Venkata-Subbaiyar v. Subbarathi-nam Aiyar.

Assignment—Mortgage—Voidable on the ground of fraud or undue influence—Payment by mortgagor after notice from assignor asking not to pay—Validity of—Effect of decree setting aside assignment.

Though a decree setting aside an assignment on the ground that it was brought about by fraud or undue influence may have the effect as between the assignor and assignee of cancelling it from the date of the assignment itself, it has not the same effect as against parties who are bound to treat the assignment as valid and binding till it is actually set aside,

Accordingly, where the plaintiff (a mortgagee) assigned his rights under the mortgage and gave notice of the assignment to the defendant his debtor but subsequently asked him not to pay to the assignee alleging that his assignment was procured by undue influence. *Held* that so long as the assignment was not set aside, the debtor was entitled as well as bound to treat the assignment as valid and any payment made by him to the assignee before the date of the decree actually setting aside the assignment was binding against the plaintiff.

Rajah of Ramnad v. *Arunachallam Chettiar* (1) ; *Trimbak Bikaji* v. *Shankar Sham Rao* (2) foll. *Gopalakrishna Iyer* v. *Gopalakrishna Iyer* (3) distinguished.

Second Appeal against the decree of the District Court of Trichinopoly in Appeal Suit No. 179 of 1910 presented against the decree of the Court of the Subordinate Judge of Trichinopoly in Original Suit No. 46 of 1909.

S. Srinivasa Iyengar and *S. Varadachariar* for Appellant.

C. V Anantha Krishna Iyer and *K. R. Rangasami Iyengar* for Respondents.

This Second Appeal came on for hearing on Tuesday the fifteenth day of October 1912, before Sundara Aiyar, and Sadasiva Aiyar, JJ., who delivered the following.

Judgment:—Before disposing of this Second Appeal, we consider it desirable to have findings on the following questions :—

(1) Whether before the receipt of Exhibit VII by the 1st defendant, Doraisawmy Iyengar had agreed to receive payment of the amount due on the hypothecation bond from the usufructuary mortgagees under Exhibit VI, whether he had agreed to release the 1st defendant and whether he had received any payment from the usufructuary mortgagees or from the 1st defendant?

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* S. A. No. 1370 of 1911. 20th February 1914.

1. (1913) 24 M. L. J. 592.
2. (1911) I. L. R. 36 B. 37.
3. (1909) I. L. R. 33 M. 123.

(2) Whether before the receipt of Exhibit VII the 1st defendant had entered into any and what contract, agreement or undertaking with Doraisawmy Iyengar with reference to the hypothecation debt?

and (3) Whether any and what payments were made to Doraisawmy Iyengar before the decree in O. S. No. 235 of 1900 on the file of the Court of the District Munsif of Kulitalai?

The findings will be on the evidence on record.

The finding is to be returned within one month from the date of receipt of this order. Time for objections, seven days.

[In compliance with the order contained in the above Judgment, the District Judge of Trichinopoly submitted the findings summarised in the opening of the Judgment.]

Judgment:—*Sadasiva Aiyar J*:—I accept the facts as found by the lower appellate Court. Those facts are:—

(*a*) that the 1st defendant as mortgagor paid Rs. 230 and odd in October 1897 to Doraisawmy Iyengar who has obtained the assignment from the plaintiff of plaintiff's rights as first mortgagee;

(*b*) that the person who obtained the second usufructuary mortgage from the 1st defendant paid at the 1st defendant's request the balance of Rs. 1,800 and interest, due under the plaintiff's mortgage bond to the plaintiff's assignee in March 1898 after the 1st defendant had got notice in November 1897 from the plaintiff that the assignment was obtained by coercion and undue influence;

(*c*) that the 1st defendant has redeemed his second (usufructuary) mortgage by payment of money, including the money which the said mortgagee had paid to the plaintiff's assignee at the 1st defendant's request;

(*d*) that the plaintiff has by the decree Exhibit D (passed in a suit of 1900) succeeded in having it declared as against the plaintiff's assignee Doraisawmy Iyengar that the assignment is not binding on the plaintiff;

On these facts, it is admitted by the plaintiff (who is the appellant in the Second Appeal before us) that he ought to give credit (in his claim in this suit for money due under his mortgage bond) to the 230 and odd rupees paid by the 1st defendant after the date of plaintiff's assignment to Doraisawmy Iyengar and before the date of the notice (Exhibit VII of

Venkata-subbaiyar v. Subbarathinam Aiyar.

Sadasiva Aiyar J.

November 1897, given by the plaintiff to the 1st defendant. The plaintiff, however contends that the 1st defendant's second mortgagee's payment of Rs. 1,800 and interest in March 1898 was made at the 1st defendant's risk as it was made after the notice of November 1897. In the first place, this notice (Exhibit VII) is worded as if the assignment by the plaintiff to Doraisawmy Iyengar by registered deed was altogether a void transaction and not a merely voidable transaction. There is no trace of an intimation by the plaintiff in Exhibit VII that he intended to bring a suit against Doraisawmy Iyengar to have the assignment set aside. On the other hand (as I said before) it treats the assignment deed as of no legal effect at all. Now, the 1st defendant would have had no defence to a suit by Doraisawmy Iyengar on the plaintiff's mortgage deed if that suit had been brought before the plaintiff had the assignment set aside by a decree obtained in a suit brought by him (plaintiff). (See *Trimbak Bhikaji* v. *Shankar Shamrav* [1], *Rajah of Ramnad* v. *Arunachellam Chettiar* [2], and IV. *American Cyclopedia page* 62). The first defendant, therefore, was entitled, and, in fact, *bound* to treat Doraisawmy Iyengar as the owner of the mortgage right under the plaintiff's mortgage bond till the assignment was so set aside by the plaintiff (and the plaintiff may or may not choose to do so). The first defendant was not bound to wait to pay up the money due on the mortgage charge binding on his property to the person owning the legal right in the mortgage till the plaintiff so chose to bring a suit and to obtain a decree, divesting the plaintiff's assignee of the latter's rights under the assignment. A decree so obtained by the plaintiff against his assignee might have the effect of cancelling the assignment from the date of the assignment itself *as between those two* but it cannot be given that effect as against those who were bound to treat the assignment as valid till it was set aside and who made payments accordingly to the assignee in order to protect and conserve their own rights and interest. The case in *Ramamurthi* v. *Secretary of State for India* [3], merely decided that a decree establishing A's title to a land as against B was binding on B, if A's title was set up by C as against B even in a suit by B against C. I do not think that that case is relevant to the decision of the question now in dispute,

1. (1913) I. L. R. 36 B. 37. 2. (1911) 24 M. L. J. 592.
3. (1911) 24 M. L. J. 469.

Venkatasubbaiyar v. Subbarathinam Aiyar.

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namely, whether payments made by a third person who is the owner of a land and who treated the assignee of a mortgagee over the land as the mortgagee entitled to receive the mortgage amount, the payments having been made before the assignment was set aside by the assignor through the instrumentality of the decision of a Court of Justice, whether such payments could be questioned by the assignor as payments made to a person who had no right to receive such payments. In other words, can the assignor ignore such payments and compel the owner of the land to make the payments again to him? I think that he cannot do so. It may be that the third person after he got notice that the assignor was disputing the validity of the assignment might have brought an interpleader suit but in the circumstances of the present case, I think that the 1st defendant was not bound to bring an interpleader suit as the assignment, on the assignor's own case, was merely voidable and not void. An observation in *Gopalakrishna Iyer* v. *Gopalakrishna Iyer* [1], (at p. 130) is relied on by the appellant's learned vakil. That observation is that "when the fact of the assignment" by the creditor "or its validity and operation is in dispute," the safest course for the debtor is to ask the assignor and the assignee to interplead and if he pays either of them, "he does so at his risk." I do not think that this observation applies to cases where the creditor does not deny the fact of the assignment and only pleads that it is voidable by him and where the third person acts as an ordinary and reasonably prudent man would do to protect his own interests. The plaintiff was asked by the 1st defendant to give security against the plaintiff's assignees claim and the plaintiff refused to do so. The plaintiff might have brought a suit at once against his assignee and obtained an injunction against the 1st defendant and the 1st defendant's second mortgagee, preventing them making payments to the plaintiff's assignee but he did not choose to do so. I therefore hold that the payments made to the plaintiff's assignee before the plaintiff brought his suit to cancel the assignment deed are binding on the plaintiff and I would dismiss the Second Appeal with costs.

Tyabji, *J*. I agree generally.

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1. (1909) I. L. R. 33 Mad. 128.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Tyabji and Mr. Justice Spencer.

Krishna Rao *alias* A. Srinivasa Rao ... *Appellant—Plaintiff* *

v

Aiyasami Padayachi ... *Respondent—Defendant*

Krishna Rao *alias* A. Srinivasa Rao *v.* Aiyasami Padayachi.

Guardian—Alienation by—Recital of necessity—Not sufficient evidence of—Burden of proof—Mesne profits and interest—Award discretionary—Must bear proportion.

Recitals of necessity contained in deeds executed by guardians and managers, are not sufficient to establish the facts recited though they are evidence to show that the facts recited were present to the minds of the parties at the time of the alienation and their absence may render it difficult for the alienee to prove that the alienation was supported by necessity.

But, where in addition to recitals of necessity there were these facts, *viz.*, that the guardian who alienated the properties was the natural father of the minor and was on affectionate terms with him, that the existence of a portion of the debt was admitted by the minor after attaining majority, that there was an expensive litigation in respect of the minor's adoption and there were no other funds available to meet the costs of the same, that the creditors who were paid off were persons who had no interest in the present litigation.

Held, that the judgment of the Lower Court holding that under the circumstances the burden was on the ward to show that the alienation was not supported by necessity was right and could not be interfered with in second appeal.

Where an alienation by the guardian is set aside and a decree given to the minor for possession with mesne profits on terms of his paying the amount of the consideration found to be binding with interest, the questions as to what should be the proper allotment for mesne profits and what the proper amount of interest to be awarded, are matters of discretion but if, where the alienation set aside is a usufructuary mortgage and the court awards interest out of all proportion to the mesne profits, the order should be set aside and the interest made to bear some proportion to the mesne profits.

In this case, their Lordships allowed for interest the same proportion of the mesne profits as the consideration upheld bore to the whole.

Second Appeals from the decrees of the Court of the Subordinate Judge of Kumbakonum in A. S. Nos. 161 and 163 of 1910 and A. S. Nos. 162 and 164 of 1910, preferred against the decrees of the Court of the District Munsif of Kumbakonum in O. S. No. 382 of 1908 and O. S. No. 394 of 1908.

K. Srinivasa Aiyangar and *K. V. Krishnaswami Aiyar* for Appellant.

T. R. Ramachandra Aiyar and *T. R. Krishnaswami Aiyar* for Respondent.

S. A. Nos. 2494 and 2495 of 1912. *3rd April 1914.

Krishna Rao *alias* A. Srinivasa Rao *v.* Aiyasami Padayachi.

The Court delivered the following

Judgment:—This appeal arises out of an unfortunate litigation. The matter has been before the Courts now four times and this is the fifth time that the questions have been considered judicially, and yet the questions in themselves are neither abstruse nor of unusual difficulty. They are whether two documents Exhibits I and VI are binding on the plaintiff. These documents were executed by the guardian of the plaintiff when he was a minor. He has now attained majority. His guardian is dead. The guardian was the plaintiff's natural father and had been appointed the testamentary guardian of the plaintiff by his adoptive father. That he was an affectionate father and guardian to the plaintiff is stated by the learned Judge and has not been denied before us.

Exhibits I and VI purport to have been executed for a total consideration of Rs. 1,575 each. The Munsif in the first instance found that they were valid to the extent of Rs. 1,000 and Rs. 500 respectivley. On appeal the Subordinate Judge upheld the validity of both *in toto*. In Second Appeal No. 1731 of 1910, the High Court remanded the suit for being retried in the light of their observations. On remand the Subordinate Judge in the judgment under appeal held that they were valid to the extent of Rs. 1,286 and Rs. 1,000 respectively.

The question as to whether or not this finding is correct, being one of fact it cannot be reconsidered by us unless it is shown the finding was contrary to law. It is contended for the appellant that the finding was arrived at without there being any evidence to support it and must, therefore be set aside.

The argument for the appellant was that the only ground referred to by the learned Subordinate Judge for the finding that the debts were binding on the minor consisted of recitals in documents to the effect that the debts were for purposes binding upon the minor and that such recitals are not by themselves any evidence of the truth of the statements contained therein. For this proposition *Makundi* v. *Sarabsukh* [1] was cited to us. There it is stated that such a recital in itself is no evidence of necessity as was held by the Privy Council in *Rajlukhi Debia* v. *Gokul Chandra Chowdhry* [2]. The decision of the Privy Council does not perhaps go to the extent mentioned

1. (1884) I. L. R. 6 A. 417. 2. (1869) 3 Bengal L. R. P. C. 57.

Krishna Rao alias A. Srinivasa Rao v. Aiyasami Padayachi.

in *Makundi* v. *Sarabsukh* [1]. The gist of the Privy Council decision so far as now relevant, may be gathered from the following portions of the judgment in *Rajlakhi Debia* v. *Gokul Chandra Chowdhry*,[2] (at page 60). Their Lordships say: "Then, upon grounds are we to treat this transaction as valid? The statement upon the face of the deed is, that the property was sold in order to liquidate the husband's debts." Then their Lordships set out the recitals and then state. "Therefore there is a clear allegation that the transaction was entered into for the purpose of defraying the debts of the husband, including a particular debt, secured by an instalment bond, and an agreement made in Court, and under the threat of an immediate execution against the Zamindaries, though the deed goes on to say that it was executed for the further purpose of performing 'the Sradh etc., of our husband, at Gaya": It is not easy to see why, if the case so stated were true, there should have been any difficulty in giving far more satisfactory evidence of it than has been given in this suit. There is the reference to an agreement in Court, there is the reference to a threat of execution and to the instalment bond which constituted the debt, at least of Narayan Das. These things, if they had any real existence, were presumably capable of being proved. But what has been the course of the litigation? The burden of proof was unquestionably on the party seeking to support the transaction, that is the present respondent. But it is an admitted fact, that in the Court of first instance he gave no evidence in support of the transaction except the deed itself. In that state of things the Principal Sudder Ameen very properly decided the issue against him." In the result their Lordships held that the Court of first instance was right in holding that the sale by the widows could not be upheld as valid and that the High Court should at the utmost have remanded the case for full consideration and should not have reversed the decision of the first court. Then we have the case of *Sunkar Lall* v. *Juddoobuns Suhaye* [3] The decision was that there was no necessity for a declaratory decree to the effect that the bond was not given, as recited in it, for money borrowed by the widow for the performance of the husband's shradh and the

1. (1884) I. L. R. 6 A. 417. 2. (1869) 3 Bengal L. R. P. C. 57.
3. (1868) 9. W. R. 285.

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grounds of the decision were that it is admitted by the vakil for the plaintiff that if the bond had not contained any such statement, a suit could not have been maintained for declaration that the money was borrowed for the purposes of the widow, and not for any purposes binding upon the husband's estate or upon the heirs of the husband ; and it is also admitted in like manner that the recital in the bond that the money was borrowed for the husband's shradh would be no evidence of the fact in a suit against the heirs of the husband, or in a suit to charge the estate. In point of law, therefore, the recital sought to be set aside makes no difference as regards the estate of the husband or as regards the evidence which would be necessary to prove the fact in a suit against the heirs". We think, however that the law relating to the admissibility and the effect of recitals is most accurately stated in *Sikherchund* v. *Dulputty Singh*[1] in the following words: "The learned Advocate-General has pressed on us that a recital in a deed would be conclusive or at least satisfactory evidence of a necessity for contracting a debt binding on a minor or a member of a joint family. I am prepared to admit that such a recital is some evidence that the fact recited was present to the minds of the parties to the transaction; and further, that the absence of any such recital in a deed would, probably, make it more difficult for the party on whom the burden of proof lay to establish the existence of a legal necessity. But I cannot accept a mere recital in a deed as evidence sufficient to establish the fact so recited." We shall proceed on the basis that the recitals relied upon by the learned Judge in this case are not sufficient to prove the necessity for the debts which are the subject-matter of the suit; that there was evidence only of the fact recited having been present to the minds of the parties to the transaction.

The learned pleader for the appellant in these circumstances pressed upon us that there is no proof of two facts which must necessarily be made out before they can be held to be binding against the minor. First that there was some liability to be discharged at the dates of Exhibits I and VI, and secondly that the liability could not be discharged except by borrowing.

Some statements made by the learned Subordinate Judge in considering the evidence with reference to these debts may not be

1. (1879) I. L. R. 5 C. 363 at pp. 374 & 375.

Krishna Rao *alias* A. Srinivasa Rao *v.* Aiyasami Padayachi.

quite accurate. But we consider that, taking the whole judgment, he proceeded on the basis that there were cetain facts which entitled him to consider that the defendants had made out a *prima facie* case that these debts were as a matter of fact incurred *bona fide* for purposes which would make them binding on the minor; so that in the absence of some more definite evidence on the part of the plaintiff the learned Judge was not prepared to hold that the debts were not so binding. The circumstances may be shortly stated as follows:—

First that the guardian was the natural father of the plaintiff and that he was an affectionate father:

Second that there is one transaction, to which I shall refer more fully and which points to the fact that the plaintiff himself considered a good portion of the debt for discharging which Exhibit VI was entered into as having been a binding debt upon himself. That circumstance is evidenced by Exhibits XII and IX. We must refer to the facts in some detail for the purpose of making this clear.

Exhibit VI is, as we have already said, for the total amount of Rs. 1575. This amount was made up of various items one of which was Rs 500 borrowed for the purpose of discharging Exhibit VII. Exhibit VII was a usufructuary mortgage the total consideration for which was Rs. 1500. It is proved that the plaintiff after attaining majority proceeded on the basis that Exhibit VII was binding upon him. That is proved by the fact that by Exhibit IX he borrowed money for the purpose of paying off Rs. 1000 out of the total consideration due on Exhibit VII. It is true that the plaintiff tried to explain away the circumstances in which Exhibits IX and XII were executed, but on page 16 paragraph 3 of the judgment under appeal the learned Judge clearly intimates that he does not accept the plaintiff's explanation of the circumstances referred to in Exhibits XII and IX.

The third fact which has been relied upon for showing that the burden of proof may be considered to have shifted from the defendants to the plaintiff is that very soon after the plaintiff had been adopted a suit No. 15 of 1896 was instituted for the purpose of establishing his adoption, that that litigation was expensive and there were no funds available for carrying on that litigation and it may well be that the plaintiff's natural father and guardian borrowed certain sums for the purposes of that very necessary suit,

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Fourthly there is the circumstance that many of the debts which were paid off by the consideration borrowed under Exhibits I and VI were originally created in favour of creditors who have no interest in the present litigation. One such creditor who has figured very prominently in the present suit is Vyasachari the 7th witness for the defence. His debts have been paid off, and the learned Judge disbelieves his evidence and indicates that Vyasachari was a witness hostile to the defence. His own evidence in chief consists of more or less formal evidence. He had necessarily to be summoned by the defence for the production of the deeds relied upon by the defendants for showing that Exhibits I and VI were executed for purposes binding upon the minor. It is true that Vyasachari says that no enquiries were made before the sums were advanced for the payment off of which Exhibits I and VI were partly executed and it must be accepted on the evidence that it has not been proved that any such *bona fide* enquiries were made as would make the bonds binding upon the plaintiff irrespective of their being supported by a valid consideration which would affect the estate. But the Judge was entitled to consider that Vyasachari being the person who was the original creditor and the recitals being proof of the fact that the matters recited, were present to his mind, that it was unlikely that he advanced moneys on an unstable foundation.

All these circumstances taken together seem to us to be sufficient for shifting the burden of proof in regard to the question of the nature with which the courts below were concerned, especially in view of the fact that the onus on the defence in cases of this kind is not always and necessarily very heavy. This appears from *Sikher Chund* v. *Dulputty Singh* [1]. "The reason why the onus was thus generally thrown upon the purchaser is explained in *Hanooman Pershad Panday's case* [2] to be based upon this principle that the circumstances under which the sale took place, and which made it necessary must be presumed to be rather within the knowledge of the purchaser than of the minor, who was often quite a child at the time of the transaction; and the same reason was given by the Court in *Syud Looti Hoossein's case* [3] "as the sale was made during the

1. (1879) I. L. R. 5 C. 363 at page 379. 2. (1856) 6 Moo. I. A. 393 at 423.
3. (1875) 23 W. R. 424.

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minority of the plaintiff at a time when he could know nothing of the circumstances of the case, it was obligatory on the defendants to prove, that when the original loan was taken from the widow, it was taken for the benefit of the infants". This rule, however, is not always applicable; See *Oomed Rai* v. *Heera Lal* [1] referred to by the Privy Council in *Hanooman Pershad Panday's case* [2]. Their Lordships there expressly say, that the question on whom the onus of proof lies in suits brought by an infant to recover property improperly sold or mortgaged,—"is one which is not capable of a general or inflexible answer. The presumption proper to be made, will vary with circumstances, and must be regulated by, and dependent, on them". When the nature of the presumption is, therefore, to be considered and especially when the provision of S. 114 of the Indian Evidence Act is made to bear upon this presumption, and when the circumstances to which we have above alluded are considered, it seems to us that it would be a bold step for us to take, sitting in second appeal, to hold that the learned Judge was wrong in holding that the debts were binding upon the minor to the extent he has held. We might illustrate our meaning by a reference to a case decided by the Privy Council and reported in *Sardar Kirpal Singh* v. *Sardar Balwant Singh* [3]. Their Lordships were in that case dealing with the question whether the plaintiffs could set aside a sale by their father on the ground that the sale was for immoral debts. Their Lordships there stated as it has been frequently held, that the burden of proving immorality is on the sons; but they refer to the fact that there was general evidence of the father being recklessly extravagant and speak of that fact as having " an important bearing on the question of necessity". The question whether the onus has been shifted is in any particular case of course a question of fact. In the case now before us we are of opinion that there were sufficient materials on which the Judge might have asked the plaintiff to give evidence of such facts as would show that the general inference that might fairly be made from the circumstances to which we have referred ought not to be drawn in this case and that the debts should be held to have been borrowed to his detriment by his guardian and natural father. Under these circumstances we see no reason to interfere

1. 6 S.D. A. R. N. W. P. 218. 2. (1856) 6 Moo. I. A. 423.
3. (1912) 24 M. L. J. 318

with the main decision in Second Appeal and S. A. No. 2494 of 1912 will be dismissed with costs.

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It has been contended, however, in regard to one matter that the decree of the lower Court must be modified. The plaintiff has under that decree been awarded mesne profits but on the other hand has been required to give interest on Rs. 1,000 in regard to Exhibit VI and Rs. 1286 in regard to Exhibit I at the rate of 12 per cent. The question as to what was the proper allowance for mesne profits and as to the proper amount of interest to be allowed are no doubt matters of discretion and we should be slow to interfere in matters of that kind. But we think in the present case that the learned vakil for the respondents has rightly conceded that the decision could not be allowed to stand. For mesne profits and interest in the present case must necessarily be taken as having a certain relationship to each other. Exhibits I and VI being usufructuary mortgages it must be taken that the usufruct of the lands, in other words the mesne profits, represented the equivalent of the interest on the amounts borrowed under Exhibits I and VI respectively. Therefore it would have been proper to proceed on the basis that such an amount of interest payable by the plaintiff should have the same proportion to the mesne profits recoverable by him as the amount of the debt declared binding upon him bears to the amount declared to be invalid. In other words the defendant will have a set off of 1286/1575 of the mesne profits of the lands referred to in Exhibit I and 1000/1575 of the mesne profits of the lands referred to in Exhibit VI. With this alteration second Appeal No. 2494 of 1912 will be dismissed with costs.

With reference to S. A. No. 2495 of 1912 our attention has been drawn to the fact that a portion of the consideration for Exhibit I consists of items that ought not to be allowed. Exhibit I was executed on the 13th June 1906. Its consideration purports to have been borrowed for the payment off of Exhibits II, IV, IVA, and V, a sum Rs. 59 borrowed on a promissory note and stamp and registration fees amounting to Rs. 25. But the learned Judge has accepted only that portion of the consideration for Exhibit I which was for payment off of Exhibits II, IVA. and V. A portion of the consideration for Exhibit II was borrowed for the purpose

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of payment off of Exhibits III. A, and III. F both of which were promissory notes. It is contended that the consideration for Exhibit III. A, namely, Rs. 175 was a debt which was barred and which should not have been paid off out of the sums borrowed under Exhibit II. We are not prepared to say that the learned Judge was wrong in holding that Exhibit I was valid to the extent that Exhibit II had to be paid off under Exhibit I by reason of the fact that it was not for him to enquire with too great a scrutiny into every item which may have made up the consideration for Exhibit II. The real question for the learned Judge was whether Exhibit I was binding and if a great portion of the consideration for Exhibit I was satisfactorily proved, we are not prepared to say that he may not proceed on the basis that other portions of the debts recited in Exhibit I were genuine unless there is something clearly showing that they were not genuine. Each case must be considered with reference to all the facts and when a document executed in 1906 has to be scrutinized in a suit instituted in 1908 with reference to transactions of 1898, it may be a more satisfactory basis to proceed on the general probabilities of the case and all the circumstances than on the basis that strict proof must be adduced by the defence with reference to every rupee making up the consideration for the debt claimed.

The decree in this case will be modified with reference to the mesne profits and interest.

We have omitted to refer to III F and IV A. III. F is a promissory note to Srinivasachari for Rs. 176-9-0. It purports to have been executed for the purpose of paying of some Kist and it is found that the Kist was as a matter of fact paid out of funds in the Court. It also purports to be borrowed for the educational expenses of the plaintiff. Exhibit IV A is executed in favour of one Saminadha Aiyar and purports to be for discharging the debts due to Vyasachari's bond for the payment of Kist and the remarks that we have made as regards Exhibit III-A apply to Exhibits III F and IV-A.

Second Appeal No. 2495 of 1912 will also be dismissed with costs; but the order as regards mesne profits will be varied as stated in S.A. No 2494 of 1912.

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The time for redemption will be extended by one month from the reopening of the District Munsif's Court, Kumbakonum after the vacation.

In conclusion we must refer to the careful tabular statement prepared by the learned junior Vakil, appearing for the appellant which has greatly facilitated the disposal of the appeal.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sadasiva Iyer and Mr. Justice Tyabji.

Malli Reddi and another ... *Appellants* * (*Plaintiffs*)

v.

Peddakka and others ... *Respondents* (*Defendants 1 and 2 and 4 to 7.*)

Malli Reddi v. Peddakka.

Exparte order excusing delay—Limitation Act, S. 5—Liability to be objected at the hearing by the other side.

An order excusing delay under S. 5 of the Limitation Act passed *ex parte* without notice to the other side can be objected to by the latter at the hearing.

Quaere if an *ex parte* order setting aside an abatement also would not stand on the same footing.

Second Appeal from the decree of the District Court of Cuddapah in Appeal Suit No. 121 of 1911 preferred against the decree of the Court of the District Munsif of Gooty in O. S. No. 167 of 1910.

J. C. Adam for Appellants.

T. V. Muthukrishna Aiyar for Respondents.

The Court delivered the following

Judgment:—*Sadasiva Aiyar J.* Following *Venkatrayudu* v. *Nagadu* [1] *Krishna Bhatta* v. *Subraya* [2] *Sarat Chandar Bose* v. *Saraswati Debi* [3] and the very recent case, A. A. O. No. 71 of 1911 on the file of the High Court, Madras, decided by *Ayling and Napier JJ.*, two days ago and also the uniform practice of this court on this particular question of the effect of an order of a court admitting an appeal (excusing the delay in its filing without giving notice to the other side), I hold that the District Judge

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* S. A. 1489 of 1912. 17th July 1914.

1. (1886) I. L. R. 9 M. 450.
2. (1897) I. L. R. 21 M. 228.
3. (1907) I. L. R. 34. C. 216 at 221.

Malli Reddi v. Peddakka. Sadasiva Aiyar, J.

had jurisdiction to consider, at the final hearing of the appeal after notice, the question whether the delay in the filing of the appeal had been adequately explained notwithstanding the *ex parte* order of his predecessor excusing the delay and admitting the appeal.

This being the only point argued in this second appeal and it being decided against the appellant as above, the second appeal is dismissed with costs.

Tyabji, J:—The decisions referred to by my learned brother (*Venkatrayudu* v. *Nagadu* [1], *Krishna Bhatta* v. *Subraya* [2], *Sarat Chandar Bose* v. *Saraswati Debi*[3] and A. A. O. No. 71 of 1911 on the file of the High Court, Madras, recently decided by *Ayling and Napier JJ.*) and also, in so far as the circumstances of the present case are concerned, the case reported in *Jhotee Sahoo* v. *Omesh Chander Sircar*,[4] lay down in express terms that "an order made *ex parte* under S. 5 of the Limitation Act (Act IX of 1871) may on proper cause shown be set aside by the Court which made it." These decisions leave no room for the expression of any opinion on my part on the question involved. The decision in Appeals Nos. 128 and 210 of 1911 on the file of this Court in which Mr. *Justice Miller* and I took part, supports the same view. Second Appeal No. 1045 of 1907 (decided by *Justice Ayling* and me) was not cited to us in this appeal; nor were the decisions above referred to cited to us in second Appeal No. 1045 of 1907. It is therefore unnecessary for me to express any opinion on the point whether Second Appeal No. 1045 of 1907 should also have been governed by the same decisions or whether it was open to us to deal with the particular question then involved as *res integra.*

For these reasons I agree that this appeal should be dismissed with costs.

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1. (1886) I. L. R. 9 M. 450
2. (1897) I. L. R. 21 M. 228.
3. (1907) I. L. R. 34 C. 216 at 221.
4. (1879) I. L. R. 5 C. 1.

Musammat Hiran Bibi v. Musammat Sohan Bibi.

PRIVY COUNCIL.

Present:—Lords Moulton and Parker of Waddington, Sir John Edge and Mr. Ameer Ali.

On Appeal from the High Court at Allahabad.

Musammat Hiran Bibi and others ... *Appellants**

v.

Musammat Sohan Bibi ... *Respondent*

Hindu Law—Compromise—Family settlement—Alienation by a limited owner.

The widow of a Hindu "A" under the power to adopt given to her by her husband, adopted "B" but remained in possession of the property of her husband and being predeceased by "B" was succeeded on her death by the widow of "B," whereupon one of the daughters of "A" brought a suit for her share of the property belonging to her father questioning the adoption of B and a compromise was arrived at. When in a subsequent suit the daughter of "B" challenged the aforesaid compromise, on the ground that B's widow, her own mother had no power to come to any compromise as it amounted to an alienation.

Held that the compromise was in no sense of the word an alienation but a family settlement in which each party took a share of the family property by virtue of the independent title which was to that extent and by way of compromise admitted by the other parties and therefore binding on them.

Lala Khunni Lal v. *Kunwar Gobind Krishna Narain* (1) approved.

Appeal heard *ex parte* from a Judgment and Decree of the High Court, dated April 6, 1911 partly affirming and partly reversing a Judgment and Decree of the District Judge of Benares, dated July 26, 1909.

One Babu Harish Chandra gave his wife Manki Bahu power to adopt a boy which she did by adopting one Parsotam Das on the understanding that during her lifetime she was to remain absolute owner of the family property. Parsotam predeceased Manki Bahu on whose decease Bindeshri Bahu widow of Parsotam came into possession of the family estate. One of the daughters of Harish Chundra and Manki Bahu, Puno Bibi, brought a suit for the recovery of her share of the estate calling into question the adoption of Parsotam. A compromise was arrived at by which various claimants got their respective shares. Later Sohan Bibi, the daughter of Parsotam and Bindeshri Bahu, brought a suit against her own mother, and others who had received shares under the compromise on which the decree of the Court was passed, alleging that her mother had no power to come to any compromise which resulted in out and out alienation of the family property and that at the very best it could

* 24th April 1914

1. (1911) L. R. 38 I. A. 87.

Musammat Hiran Bibi v. Musammat Sohan Bibi.

not bind the reversioners. The District Judge of Benares decided upholding the compromise but on appeal to the High Court, the findings of the lower Court were reversed.

Appeal was then preferred to His Majesty in Council.

De Gruyther, K. C. with him *Dube* for the appellants argued that the compromise was fair, just and reasonable and therefore binding on the respondent.

This was a case of family arrangement and was covered by *Lala Khunni Lal* v. *Kunwar Gobind Krishna Narain* [1] and had nothing whatever to do with the question of alienation by a limited owner without legal necessity.

The Respondent did not appear.

The judgment of their Lordships was delivered by

Lord Moulton.—In this case their Lordships are of opinion that the facts bring it within the decision of *Lala Khunni Lal* v. *Kunwar Gobind Krishna Narain*[1] in other words, that the compromise in question is in no sense of the word an alienation by a limited owner of the family property, but a family settlement in which each party takes a share of the family property by virtue of the independent title which is, to that extent, and by way of compromise, admitted by the other parties.

Their Lordships will accordingly humbly advise His Majesty that this appeal should be allowed, that the decree of the High Court should be set aside, that the decree of the District Judge should be restored, and that the appellants should have their costs of this appeal and the costs of the suit in both Courts.

Solicitors for appellants :—*Barrow, Rogers & Neville.*

PRIVY COUNCIL.

Present :—Lords Moulton and Parker of Waddington, Sir John Edge and Mr. Ameer Ali.

On Appeal from the High Court at Calcutta.

Ragunath Das and others ... *Appellants* *

v.

Sundar Das Khetri and another ... *Respondents.*

Ragunath Das v. Sundar Das.

Insolvent Debtor's Act, 1848 (11 & 12 Vic. Ch. 21)—Judgment-debtor—Sale by Official Assignee—Sale—Execution of decree after vesting of property in Official Assignee—Notice—Procedure—S. 49—248, 32, 372 and 291 of Civil Procedure Code of 1882—Practice—Raising point of limitation for the first time.

1. (1911) L. R. 38 I. A. 87, 102.

* 18th May 1914.

Ragunath Das v. Sundar Das.

Where subsequent to the attachment and order for sale of certain property an order was made under the Insolvent Debtors' Act, 1848, vestingthe properties in question in the Official Assignee who was then served with notice as to why he should not be brought on record in place of the judgment-debtor and on his failing to appear the property was sold by auction, the Official Assignee also selling the properties in due course, and an action being brought to determine which sale was valid:

Held, that attachment in execution though followed by an order for sale did not confer on the judgment-creditor any charge on the property, its effect being only to avoid private alienation, that the effect of an order in insolvency being to vest the property in the estate of the insolvents in the Official Assignee and to bring the judgment-creditor's claim down to the level of the claims of other creditors, the sale in execution was irregular and that of the Official Assignee good.

That the notice issued to the Official Assignee being only one to show cause why he should not be substituted in place of the judgment-debtor and not one as it ought to have been under S. 248 to show cause why the decree should not be executed against him, the order could not bind the Official Assignee.

Having regard to S. 49 of the Insolvent Debtor's Act, the proper order the executing court should have made under the circumstances was to stay the sale.

Sarkies v. *Mussammat Bhundho Bace* (1) *Goodall* v. *Mussoorie Bank Ltd.*, (2), *Gopal Chunder Chatterjee* v. *Gunamoni Dasi* (3) *approved. Malkarjun Bin Skidramappa Pasare* v. *Narhari Bin Shivappa* (4) held not applicable.

Held, further, that a point of limitation never raised at any stage of the proceedings in courts below, and which required an inquiry into facts could not be raised for the first time before the Privy Council.

Appeal from a Judgment and Decree of the High Court dated June 4, 1912, reversing a Judgment and Decree of the Subordinate Judge of Burdwan, dated September 8, 1909.

Sundar Das Khetri and Bolanath Khetri, the respondents, were the owners in possession of a colliery in the District of Burdwan. This they granted on lease to Atul Nath Chatterji and others. A sum of Rs. 13,000 was raised on mortgage which sum remaining unpaid a decree was obtained by the mortgagee in Jan. 1914. The rent and royalty on the output of coal becoming due, the lessors, the respondents obtained a decree for Rs. 3070 and on July 13, 1904 applied for execution of their decrees and obtained an attachment of the said colliery and its equipment. On September 8th 1904, lessees filed their Schedule in Insolvency in the High Court at Calcutta, which passed the usual order vesting all their real and personal estate and effects in the Official Assignee and on Sept. 9, 1904 filed their inventory and estate paper and entered therein the claims of the mortgagee and of the respondents. On Sept. 10, 1904 a copy of the vesting order was filed by

1. (1869) 1 N. W. P. H. C. R. 172.
2. (1887) I. L. R. 10 A. 97.
3. (1892) I. L. R. 20 C. 370.
4. (1900) L. R. 27 I. A. 216.

Ragunath Das v. Sundar Das.

the insolvents in the Court of the Subordinate Judge of Burdwan and on Sept. 12 an order was made that the attached property could not be sold in face of the vesting order and staying the sale till further orders. On Sept. 30, 1904, the respondents applied to the Subordinate Judge that the Official Assignee should be substituted in place of the judgment-debtors and made a party to the proceedings; notice was accordingly issued and served on the Official Assignee, but without further proceedings, the sale was allowed to proceed. On March 6, 1905 the respondents who had obtained leave to bid, bought the properties in question for Rs. 3115; on May 23, 1905 an order was made by the High Court in the said Insolvency Proceedings granting liberty to the Official Assignee to sell the properties in question which were ultimately sold by private treaty to a a banker who sold them to the appellants. In consequence of the opposition of the respondents the appellants brought the suit which the Subordinate Judge of Burdwan decreed. The High Court reversed the findings of the lower Court. Appeal was then preferred to His Majesty in Council.

De Gruyther, K. C. and *Dunne* for the appellants contended that the attachment gave respondent no right in or charge over the property which vested in the Official Assignee and that the further proceedings in execution and the eventual sale, were invalid and did not affect the rights of the Official Assignee and that notice was not duly served on him.

Reference was made to Insolvent Debtors' Act of 1848, Ss. 7 and 49 *Goodall* v. *Mussoorie Bank Ltd*[1], *Sarkies* v. *Mussammat Bandho Baee*[2].

Dube for the respondent contended that the letter of the Subordinate Judge giving notice of execution proceedings to the Official Assignee through the bailiff was duly served under Ss. 75, 91 and 92 of the Code of Civil Procedure of 1882. He referred to S. 244 of C. P. C. of 1882.

[*Lord Moulton*:—S. 244 only deals with jurisdiction.] He then referred to S. 311 of C. P. Code.

[*Mr. Ameer Ali*:—Has there been any decision on it? It does not assist you.]

Reference was then made to S. 270.

De Gruyther, K.C. was not called upon to reply.

1. (1887) I. L. R. 10 A. 97. 2. (1869) 1 N. W. P. H. C. R. 172.

Ragunath Das v. Sundar Das.

The Judgment of their Lordships was delivered by

Lord Parker of Waddington.—The action in which this appeal arises is an action for the recovery of a leasehold colliery. The plaintiffs (the present appellants), claimed title to the property under the Official Assignee in the insolvency of the lessees. The order vesting the property in the Official Assignee was made under the Insolvent Debtors (India) Act, 1848, on the 8th September 1904. At the date of this order the colliery had been attached in execution case No. 303 of 1904, in which the lessees were the judgment-debtors and the defendants (the present respondents), were the judgment-creditors, and an order had been obtained for the sale of the interest therein of the judgment-debtors. Counsel for the respondents admitted that attachment in execution of a money decree followed by such an order for sale does not confer on the judgment-creditor any charge on the land (see *Sarkies* v. *Mussumat Bandno Bace* [1]). An attachment prevents and avoids any private alienation, but does not invalidate an alienation by operation of law such as is effected by a vesting order under the Act of 1848, and an order for sale, though it binds the parties, does not confer title.

It follows that under the order of the 8th September 1904, the property vested in the Official Assignee free from any charge in favour of the judgment-debtors. The Official Assignee in due course, by order of the Court having jurisdiction in the insolvency, sold the property, and the appellants derive title through the purchaser. Their title is thus *primâ facie* a good and valid title, but it is disputed by the respondents under the following circumstances.

On the 12th September 1904 the Judge in the execution proceedings stayed the sale therein directed, until further order. This was the proper and indeed the only thing he could do, for the judgment-debtors had no longer any interest which could be sold. Further, if, as was no doubt the case, the judgment debt was included in the schedule filed by the insolvents under the Act, Their Lordships are of opinion that he was bound to stay the sale under Section 49 of the Act. At any rate the execution could not proceed until the Official Assignee had been properly brought before the Court, and an order binding on him had been obtained. In Their Lordships' opinion this could only be

1. (1869) 1 N. W. P. H. C. R. 172.

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done by obtaining an order for the issue of, and by serving him with a notice under Section 248 of the Civil Procedure Code of 1882, which was the Code then in force. It was suggested in argument that he might have been made a party to the proceedings either under Section 32 or under Section 372 of the Code, but even if these sections are applicable after final decree, as to which there is considerable doubt (see *Goodall* v. *Mussoorie Bank, Ltd.*, [1]), no proceedings seem to have been taken thereunder. What the judgment-creditors did was this: they applied to the Judge in the execution case for an order, and on the 30th September 1904, and again on the 3rd November, obtained an order for the issue and service on the Official Assignee of a notice calling upon him to show cause why he should not be substituted in the suit for the judgment-debtors. This was not a proper notice under the 248th section. A notice under that section should have called upon the Official Assignee to show cause why the decree should not be executed against him. Had the Official Assignee been served with such a notice, it is at least probable that he would, as in Their Lordships' opinion he certainly could, have shewn good cause why the decree should not be executed, the property having under the Act and vesting order been transferred to him for the benefit of the creditors of the insolvent generally. It is possible that the notice might be upheld as a proper notice preliminary to adding the Official Assignee as a party under the 32nd section if that section were applicable, but in order to bind a party added, under the 32nd section, he has, after being added, to be served with a summons to appear and answer, and it is not suggested that any such summons was served. Similarly, it is not suggested that any order to carry on proceedings was obtained under the 372nd section.

Having obtained leave in that behalf the respondents proceeded to serve the notice in question, and Their Lordships will assume that the notice was duly served on the Official Assignee. The Official Assignee, took no notice of it, possibly because he had no objection to being substituted as a party, and expected to be served with notice of any further application against him. There is no evidence that he knew that an order for sale had been already made. The time fixed by the notice for cause to be shown

1. (1887) I. L. R. 10 A. 97.

Ragunath Das v. Sundar Das.

having expired, the respondents, without further notice to the Official Assignee, applied for and obtained an order not only substituting the Official Assignee as a party in the place of the judgment-debtors but directing the sale to proceed. The sale accordingly proceeded. There had to be a fresh sale proclamation by reason of the 291st section of the Code. Such proclamation is not in evidence, but Their Lordships must presume in default of evidence to the contrary that the property offered for sale was the property ordered to be sold, that is to say the right and interest of the judgment-debtors in the colliery. At the sale the respondents (the judgment-debtors), having obtained leave to bid, became the purchasers. The sale was confirmed by the Court on the 8th April 1905, and on the 25th April 1905, the appellants obtained the usual certificate which refers to the right, title and interest of the judgment-debtors as the property sold. Their Lordships are of opinion that this sale was altogether irregular and inoperative. In the first place the property having passed to the Official Assignee it was wrong to allow the sale to proceed at all. The judgment-debtors had no charge on the land, and the Court could not properly give them such a charge at the expense of the other creditors of the insolvents. In the second place no proper steps had been taken to bring the Official Assignee before the Court and obtain an order binding on him, and accordingly he was not bound by anything which was done. In the third place the judgment-debtors had at the time of the sale no right, title, or interest which could be sold to or vested in a purchaser, and consequently the respondents acquired no title to the property.

Their Lordships' attention was called in this connection to the case of *Malkarjun Bin Shidramappa* v. *Narhari Bin Shivappa* [1] but in their opinion there is nothing in that case which has any bearing upon the present appeal. As laid down in *Gopal Chunder Chatterjee* v. *Gunamoni Dasi*, [2] a notice under section 248 of the Code is necessary in order that the Court should obtain jurisdiction to sell property by way of execution as against the legal representative of a deceased judgment-debtor. In the case in 27 Ind. Appeals, such a notice had been served, and the Court had determined, as it had power to do for the

1. (1900) L. R. 27. I. A. 216=I. L. R. 25 B. 337.
2. (1892) I. L. R. 20. C. 370.

Ragunath Das v. Sundar Das.

purpose of the execution proceedings, that the party served with the notice was in fact the legal representative. It had therefore jurisdiction to sell, though the decision as to who was the legal representative was erroneous. There being jurisdiction to sell, and the purchasers having no notice of any irregularity, the sale held good unless or until it were set aside by appropriate proceedings for the purpose. The present case is of a wholly different character. No proper notice was served under the section, and the Respondents had full notice of, and indeed were responsible for, the irregularities of the procedure adopted.

The Respondents suggested that with regard to certain machinery which was included in the sale of the colliery by the Official Assignee and which was also sought to be recovered in this action, the statute of limitations was a good defence. This point does not appear to have been taken at any time prior to the hearing beforeTheir Lordships' Board. It was not one of the issues settled by the Court on the action, nor did the respondents mention it among their grounds of appeal from the decision of the Subordinate Judge. Their Lordships consider that it involves an inquiry as to the nature of the machinery to which it is said to be applicable, and it is therefore too late to raise it.

Their Lordships will humbly advise His Majesty that the appeal ought to be allowed and the decree of the High Court of the 4th June 1912 set aside with costs, here and below, and that the judgment of the Subordinate Judge of Burdwan of the 8th September 1909 ought to be restored.

Solicitors for Appellants—*W. W. Box & Co.*

Solicitors for Respondents—*Barrow, Rogers & Nevill.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Present :—Mr. Justice Tyabji and Mr. Justice Spencer.

Kunhambi and 6 others ... *Appellants.** (*Defendants* Nos. 15 to 21.)

v.

Kalanthar and others ... *Respondents.*

Kunhambi v. Kalanthar.

Madras Civil Courts Act, S. 16—Custom—Mahomedan Law—Mappillas—North Malabar—Applicability of Marumakkathayam Law—No presumption—Question of fact—Circumstances to be considered.

The strict rules of Mahomedan law may be varied by proof of family custom or usage, the law to be administered by Courts being the law which the parties as a matter of fact by their customs and usages have adopted and not the law which

* S. A. No. 1498 of 1911. 24th March 1914.

Kunhambi v. Kalanthar.

Tyabji, J.

either by a consideration of historical circumstances relating to the parties or of their religious books or otherwise, the court should consider to be the law that they ought to have adopted.

Whether an alleged custom can be enforced at all or whether it is uncertain, irregular or unreasonable and as such ought not to be recognised is a question of law but the question whether the custom exists and if it exists, it applies to a particular person or set of persons is a question of fact to be decided in each case until it becomes so well understood that the courts may take judicial notice of it.

It is erroneous to say that there is a presumption in the case of North Malabar Mappillas that they are governed by Marumakkathayam law as it is not a matter on which there could be a presumption.

Although if there had been a series of decisions holding concurrently that the community has adopted this system the courts might have taken judicial notice of that fact, in the absence of such a series of decisions, the question remains in each case, a question of fact, whether the particular parties have adopted the one system or the other. In determining that question, various circumstances may have to be weighed on one side and the other; *e. g.* that the parties being Mahomedans, there would be a tendency to follow the rules of Islam, that a great number of families as a matter of fact observe the Marummakkathayam law, the conduct of parties, &c.

Second Appeal from the decree of the Court of the Subordinate Judge of North Malabar in Appeal Suit No. 189 of 1910, preferred against the decree of the District Munsif of Kuttuparamba in Original Suit No. 565 of 1908.

The Court delivered the following

Judgment:—*Tyabji J.* The question on which the parties to this appeal are at issue is whether they are governed by Muhammadan Law or Marumakkathayam Law. They are Mappillas of North Malabar. Both the lower Courts have decided that the Mahomedan Law is applicable. The learned District Munsif proceeded on the basis that "a custom varying Mahomedan Law, to be recognised as valid, must satisfy the essentials of peaceableness and consistency. " These elements " he added "appear to be wanting in this case." In appeal the Subordinate Judge came to the same conclusion—on the ground apparently that the general presumption that the parties follow the law of their religion. He stated, however, that no authority was quoted for the proposition that Mappillas in North Malabar follow the Marumakkathayam Law. In conclusion he said:—"I do not think, for the reasons pointed out by the District Munsif, that the form of evidence, which the law demands to prove a custom, is present in this case."

It is argued before us that the findings of the Lower Courts proceed on such an erroneous view as to the nature of the

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question to be decided and such a disregard of the presumptions applicable that we ought to interfere in second appeal.

Neither of the lower Courts has alluded to the Madras Civil Courts Act, S. 16 of which lays down:—"Where, in any suit, or proceeding, it is necessary for any Court under this Act to decide any question regarding succession, inheritance, marriage or caste, or any religious usage or institution.

(*a*) The Mahomedan Law in cases where the parties are Mahomedans and the Hindu Law in cases where the parties are Hindus, or (*b*) any custom (if such there be) having force of law and governing the parties or property concerned, shall form the rule of decision." The Act expressly mentions customs and usages as capable of being enforced by Civil Courts, and in this respect it differs from such Acts as the Civil Courts Act to Bengal, the United Provinces and Assam, Act XII of 1887, S. 37 of which does not refer to customs and usages. The Courts bound by the latter Act had through a series of decisions been holding that inasmuch as the Mahomedan Law was by the legislature required to be enforced by the courts and inasmuch as that Act did not refer to custom, it was not permissible for the parties to adduce any evidence of custom varying the strict Mahomedan Law. The rule as I have just stated was followed by the Allahabad High Court in the case of *Jammya* v. *Diwan*[1] and in a later case which was taken in Appeal to the Privy Council. In the latter case the position taken up by the Allahabad High Court is very distinctly laid down. It appears from the decision of the Privy Council reported as *Mohammad Ismail Khan* v. *Lala Sheomukh Rai*[2] that the following two issues among others were raised.

(1) "Can the answering defendants plead that the family in the matter of inheritance is subject to any custom in suppression of the Mahomedan Law?"

And (2) "If so does any custom prevail in the family depriving female issue of right of inheritance in presence of their male issue"?

All the three courts in India in that case decided that no evidence of the alleged custom was admissible. Their Lordships of the Privy Council, however, reversed these decisions. Their judgment consisted of the following sentence:—"Their Lordships

1. (1900) I. L. R. 23 A. 20. 2. (1912) 17 C. W. N. 97.

have considered and they think that the suit should be remanded to the High Court to enable the parties to file evidence with respect to issue No. 3 as to the family custom."

As the Privy Council have not given reasons for differing from the series of decisions pronounced by the Allahabad and the Calcutta High Courts it is only possible to fall back on previous decisions in order to discover the principle underlying the rule of law enacted specifically in the Madras Civil Courts Act and held by the Privy Council to be applicable notwithstanding that it finds no explicit mention in the Act with which they were dealing. That principle was considered with very great learning in a celebrated Judgment by *Sir Erskine Perry, C. J.* of the Supreme Court of Bombay in *Hirbae and others* v. *Sonabhe &c. Co.*[1] The Chief Justice considers this point at page 116 *et seq.* He lays down in effect that such legislative enactments as we have to deal with and as govern the rights of the parties in the present case proceed on the basis that the Courts have to give their decisions in accordance with the law as delivered to them for administration by their sovereign and that the law so delivered to them consists of that law which the parties as a matter of fact by their customs and usages have adopted, not the law which the court either by a consideration of the historical circumstances relating to the parties, or of their religious books or otherwise should consider to be the law that they ought to have adopted. If that law, being sufficiently certain and not opposed to public policy, is of such a nature that the courts can give effect to it, then the enactments require that they should give effect to it. In dealing with the rules that are included in the body of law to which any class of persons is subject he points out various considerations rendering customs peculiarly important: "In every well-ordered community" he says "it is essential to its place that clear and certain rules should exist as to the various relations of domestic life, and in every early history it will be found, that as to most of these, such as marriage, succession, adoptions, as well as to the various occupations, agricultural, pastoral or mercantile, which may happen to prevail in such society, the exigencies of man have framed rules long before written laws existed. A considerable

1. (1847) Perry's O. C. 110 S. C. 2 Morley's Digest 431.

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body of law thus arises in every State, and the legislator, when he is required to enter upon his task, rarely seeks to interfere with regulations which the habits and manners of the people have spontaneously adopted." (Perry O. C. 116.) The reason of this non-interference is that "it is a matter of comparatively little interest to the commonwealth how the affairs of the private individuals are conducted among themselves." "In some case the wisdom, but in most the indifference or want of skill, of the legislature, has left mankind to frame their own rules for the conduct of daily life, and when such rules grow up into a custom, we may see by the present cases that it is often more difficult to change it than even the peculiar religion out of which it perhaps arose." Sir Erskine Perry cited the words of Austin. "The prevalence of a custom amongst the governed may determine the Sovereign, or some political superior in subjection to the Sovereign, to transmit the custom into positive law"; and concludes that the policy leading to such enactments as the charters of the High Court, or the Civil Courts Acts "proceeded upon the broad, easily recognisable basis of allowing the newly conquered people to retain their domestic usages." "The main object was to retain to the whole people lately conquered their ancient usages and laws, on the principle of *uti possidetis.*" These seem to me to be the principles which must be taken to have been reaffirmed by the last decision of the Privy Council to which I have referred.

Therefore the question must in each case be—what as a matter of fact is the rule of law followed amongst the particular parties before the court?

In this connection it seems to me to be necessary to point out that both the lower courts have been misled by the use of the word "custom." No customary rule of conduct will be enforced unless it satisfies those general requirements of the law which are well known, and which alone can give to it a claim to judicial recognition. Hence previous adjudication on the question whether a particular rule of conduct satisfies those requirements, would afford guidance in subsequent cases; and such previous decisions may be binding on the court considering the same question subsequently; that question being whether the alleged rule of conduct can be enforced at all or whether, *e.g.*, it is uncertain

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or opposed to public policy, or unreasonable. This question is one of law and may be considered irrespective of the question whether the custom actually exists, as in *Moult* v. *Halliday* [1]. But a further question has always to be considered (unless the parties admit that it must be answered in the affirmative) whether the rule of conduct (assuming that it has all the elements entitling it to be so recognised) applies to any particular person. The latter question is a question of fact; and for the reason I have already stated the latter question is resolvable into: have the particular parties as a matter of fact adopted this rule of conduct?

Our attention was drawn to a number of rulings of this court in which the question was considered by which system of law the parties then before the court (being the Mappillas of North Malabar) were governed, and it was argued that the presumption arising from decisions is that the parties now before us are governed not by the Muhammadan Law but by Marumakkathayam Law. The cases reported and unreported are collected in Moore's Malabar Law & Custom (3rd edition) pages 323, 324 & 325 where nine cases in all are cited and as a result the learned author says "The result of these decisions appears to be that this question is left as it was decided in 1860 by the Sudder Court following Mr. Holloway's dictum" (in S. A. No. 651 of 1860). That *dictum* was as follows:—"The presumption of course is that the descent is that of nephews, as is the rule of North Malabar universally." It seems to me, however, that this exposition proceeds on the erroneous basis, that presumptions of this nature can be raised by counting the decisions in which facts have been found to be similar to those alleged in the case under enquiry or by showing that in the last decision the facts were held to have been to a particular effect. I am unable to see how in a case of this kind it is possible for the court to lay down by a decision that there shall be a presumption one way or the other. I am further of opinion that the courts have not purported to do so. It is one that if there has been a series of decisions holding concurrently that a particular community of persons has adopted a special Customary law, then the Courts will take judicial notice of the repeatedly proved fact. But this is not what we are asked to do.

1. (1898) I. Q. B. 125.

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Two reported decisions have been cited to us; one is the case of *Assam* v. *Pathumma* [1]. The passage dealing with this question is at pages 504, 505 and 506. The question there also were whether the rights of the particular parties in regard to the property which formed the subject of litigation had to be governed by the Marumakkathayam law or by the Mahomedan Law. The decision according to *Subramaina Aiyer, J.* depended on these facts (1) that the father and the paternal ancestors of one Pokkar had all along been following the Mahomedan Law. This fact was, it is stated, established beyond doubt by the evidence (2) that Pokker's mother was governed by the Marumakkathayam Law, (3) the the Mappillahs of North Malabar were originally and generally bound by the Mahomedan Law but that later they had adopted certain rules of conduct taken from the Marumakkathayam law. This third fact was also like the two other facts established by evidence. The evidence was furnished by Logan's Malabar volume I, page 273 to which the Judge was entitled to refer in accordance with Ss. 49, 57 and 32 (4) of the Evidence Act. Taking these three facts, *Subramania Aiyar, J.* by a process of reasoning in which he also included considerations of principle and of equity and justice came to the conclusion that in regard to the particular parties the conclusion of the lower Courts was correct, namely that the Mahomedan Law should be taken to have been the law of the parties. In a later case *Kunhimbi Umma* v. *Kandey Moithin* [2], *Subramania Aiyar, J.* had again to consider a similar question, and he there held that the parties before him were governed not by the Mahomedan law but by the Marumakkathayam law, and he stated "The question will, to a great extent, depend upon the circumstances of each case and the presumption would often be in favour of Marumakkathayam rule of devolution, since we know that, in fact, that rule is followed in very many instances by such families." Here therefore he based his decision on a fourth fact quite distinct from the three facts which were before him in the earlier case and on which in his opinion the decision of the earlier case depended. This fourth fact was the knowledge of the fact that a great number of "Such families follow" the Marumakkathayam Law.

1. (1899) I. L. R. 22 M. 494. 2. (1903) I. L. R. 27 M. 177.

I have referred to the mode in which each of the first three facts were brought to the cognisance of the Court. With reference to the fourth fact the point is so often misunderstood that I must explain myself more fully. When the fact of the existence of a custom amongst a particular class of people has been repeatedly proved in the Courts, the Courts have the power to take judicial notice of it. *George* v. *Davis*[1] strikingly illustrates the rule. The question thus arose in the following circumstances. There was a reported decision, *Moult* v. *Halliday* [2] in which *Hawkins and Channell JJ.* had felt unable to take judicial notice of the existence of a particular usage. Thirteen years later in 1911, the County Court Judge took Judicial notice of the existence of that same custom, and *Bray and Lord Coleridge JJ.* held that this could be done notwithstanding that thirteen years earlier the Court had held that then the custom could not be judicially noticed. *George* v. *Davies* [1].

The two English cases to which I have referred bring out with great lucidity the two component elements of the question: one an element of fact and the other of law: and the decisions also show when and to what extent Courts have power to take judicial notice of previous decisions. Thus in the former case *Hawkins, J.* said " I am very sorry to say that our decision in this case cannot settle the law on the question which the parties wished to have decided. The question which came before the County Court Judge for decision was whether or not the alleged custom had been proved and that is a question of fact, and not a question of law. There is nothing here to show that this alleged custom had been recognised so as to dispense with the necessity for proving its existence. In this particular case I wish we had power to consider the evidence, and determine whether the alleged custom had really been established, but the law is that the County Court Judge is the sole Judge on question of fact, and therefore, on this ground only we must dismiss the appeals. There was evidence before the County Court Judge which justified him in arriving at the conclusion that the alleged custom had not been proved." With reference to the legal aspect of the point he said " Having heard the question as to the reasonableness of the alleged custom fully discussed in the course of the argument. I think we ought to give our opinion upon it, and I

1. (1911) 2 K. B. 445. 2. (1898) 1 Q. B. 125.

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have no hesitation in saying that, in my opinion, not only would the alleged custom not be so unreasonable that it could not prevail, even if proved, but it would be so reasonable that, if it were established by evidence, it ought to be acted upon." And *Channell, J.* said :—"I am entirely of the same opinion. I agree with everything that has been said in the judgment which has just been delivered, and I should not have considered it necessary to add anything, were it not that the case raises a question of some interest as matter of law.' It depends on what is the nature of that thing which is called a custom. A custom is what is so wellknown and understood that in transacting business it is unnecessary to mention it, because it is so well-known that it must be taken to be incorporated in every contract, unless something to the contrary is said. For instance, there is the custom of a month's notice or a month's wage which is so well-known that every person who is hired as a domestic servant is taken to be engaged on those terms, unless there is an express stipulation to the contrary. The question as to the existence of a custom is a question of fact, and it is necessary to prove the custom in each case, until eventually it becomes so well understood that the courts take judicial notice of it. In the present case the custom has not got to the stage of being judicially noticed, but the court must in each case have evidence of the custom, and must form an opinion on that evidence. Here the County Court Judge has formed an opinion and we cannot review his finding. I think the alleged custom, if it were proved would be reasonable, and certainly it would not be so unreasonable that it could not be acted upon. There can be very few cases, where a custom had been sufficiently proved, in which a Court could hold that it was unreasonable; for that it must be convenient is shown by the fact that it has been established and followed. In the later case Bray J. said: " At the trial the plaintiff relied upon a custom that either party in the case of a contract for the engagement of a domestic servant may terminate the contract of service at the end of the first month by giving notice to that effect at or before the expiration of the first fortnight of the service. The County Court Judge was asked to take judicial notice of that custom and to act upon it. The Judge, who has been a County Court Judge for many years and who must have had great experience of

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these cases which almost necessarily, owing to the smallness of the sums claimed, are brought in the County Court, said that he had in previous cases taken judicial notice of the custom, and he would take judicial notice of it in this case. I cannot say that the Judge was wrong in so doing. A time must come when a County Court Judge having had the question of the existence of this custom before him in other cases, is entitled to say that he will take judicial notice of it, and will not require it to be proved by evidence in each case. In *Moult* v. *Halliday* 1 evidence was called in support of the custom, but the County Court Judge came to the conclusion upon the evidence that the custom was not proved, and he gave Judgment for the defendant. Upon appeal it was contended that the Judge was bound to take judicial notice of the custom. This Court held that the question whether the custom was proved was a question of fact, upon which the County Court's decision was final, upon that ground alone they dismissed the appeal. That case was decided over thirteen years ago, and, as I have said, when this custom is continually being put forward and proved by evidence, a time must come when a Judge may say that he no longer requires it to be proved, but that he will take judicial notice of it. I cannot say that the Judge was wrong in taking judicial notice of the custom, and, therefore, that point fails."

In the same way there was nothing to prevent *Subramania Aiyar, J.* from taking judicial notice of the fact to which he allowed in *Kunhimbi Umma* v. *Kandy Moithin* 2 that a great, number of Mappillas families adopted the Marumakkathayam law nor do I see any more inconsistency between the legal points of view from which *Kunhimbi Umma* v. *Kandy Moithin*2 and *Assan* v. *Pathumma* 3 were respectively decided than between *Moult* v. *Halliday* 1 and *George* v. *Davis* 4. In each case that question was one of fact. The considerations on which the decision in the first case *Kunhimbi* v. *Kandy Moithin* 2 proceeded were different from those on which the second case was decided. Being the decision of so distinguished Judge as Sir Subramania Aiyar they must no doubt be taken to be of assistance and guidance as to the way in which the consideration of such a question must be approached.

1. (1898) 1 Q. B. 125.
2. (1903) I. L. R. 27 M. 77.
3. (1892) I. L. R. 22 M, 494.
4. (1911) 2 K. B. 445.

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But they cannot be distorted into authorities for holding that because he found on the evidence in the one case that the parties were governed by the Marumakkathayam law therefore in any subsequent case there is a presumption or likelihood that the parties should be governed by the same law. The question would be whether there is the same basis for coming to the same conclusion. *Subramania Aiyar J.* himsel flaid down the true basis of presumption to be twofold: either some policy of law or some general conformity with fact, See *Subramanian Chetty* v. *Arunachellam Chetty* [1].

I, therefore, come to the conclusion that where the question is whether the particular parties are governed by the Marumakkathayam law or the Mahomedan law the real issue to be decided is one of fact, namely, whether the particular parties have adopted the one system of law or the other and whether they have been governing their conduct in accordance with the one system or the other. For that purpose various considerations may have to be weighed on one side or the other, some of which have been alluded to by *Sir Subramania Aiyar.* One consideration is that if the parties belong to Musalman religion, the rules of succession being a portion of that religion, it may be inferred that there would be a tendency to follow the rules of Islam as regards inheritance. Another consideration pointing the other way would be that if the parties are Mapillahs it is known—I adopt *Justice Subramania Aiyar's* dictum—that a great number of families as a matter of fact observe the Marumakkathayam law. There may be also some considerations as regards the way in which property has been held or the way in which the parties have conducted themselves in the past, if, for instance, the parties themselves or their ancestors have in previous litigation set up that they are governed by one system on the other. The mode of proving the existence of custom in any particular case is thus alluded to by Thibaut System des Pandakten Rechts, I. P. 15 in a passage cited by Sir Erskine Perry (Perry's O. C. 118) "A custom therefore, to hold good in law, requires, besides the above negative conditions (*viz.*, that the custom is not unreasonable and applies to matters which the written law has left undetermined) the following positive condition, namely, that the majority at least

1. (1904) I. L. R. 28 M. 1. at p. 4.

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of any given class of persons look upon the rule as binding, and it must be established by a series of well-known, concordant, and, on the whole, continuous instances. How many examples are necessary to prove a custom cannot be laid down beforehand, neither is the number to be left to the arbitrary discretion of the Judge; but the point in each case is whether the common consent of the class in question is clearly demonstrated by the number of instances proved. These considerations are not exclusive of each other. One attention must be given to each of them and to any others that may be relevant under the Evidence Act to the questions of fact involved.

It is true that neither of the Courts below has considered the question in the manner in which in my opinion it should be considered: and it is also true that some remarks seen to me with great deference to both the lower courts, meaningless in reference to the real question to be decided. But as I have pointed out there is no basis for taking judicial notice of any circumstances which in itself is decisive of the question of fact or which has so strong a bearing on the question of fact, as to raise a presumption that the question of fact must *prima facie* be decided in any particular way, and I am unable to hold that the finding arrived at by both the courts is a finding based on such an erroneous mode of approaching it and in such disregard of the evidence as would entitle us to interfere with it in Second Appeal.

It seems to me that the evidence has as a matter of fact been considered and that the decision, notwithstanding some remarks, is based on the evidence. I would therefore dismiss this second appeal with costs.

Spencer, J.—I concur.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Oldfield.

Adyapadi Ramanna Udpa and others ... *Petitioners* * *Appellants*.

v.

Krishna Udpa and others ... *Respondents* (*Respondents.*)

Adyapadi Ramanna Udpa v. Krishna Udpa.

Civil Procedure Code, O. IX, R. 9 (1)—Dismissal for default—Gross negligence of next friend—Ground for setting aside.

Gross negligence of the next friend of a minor plaintiff is a ground entitlin the court to set aside an order dismissing a suit for default.

* CR. P. No. 1CCO of 1912. 29th July 1914.

Adyapadi Ramanna Udpa v. Krishna Udpa.

Oldfield, J.

Petition under S. 115 of Act V of 1908, praying the High Court to revise the order of the District Court of South Canara in C. M. A. No. 6 of 1911 preferred against the order of the Court of the District Munsif of Mangalore in Interlocutory Application No. 48 of 1911.

B. Sitarama Rao for Petitioner.

K. Yegnanarayana Adiga for Respondent.

The Court delivered the following

Judgment:—It is contended that the District Judge's decision should be set aside in revision, because he has dealt with this case without reference to the position of petitioners as minors litigating by their guardian.

The question is whether the point was entitled to consideration by the Lower Courts in dealing with the question before them, one raised under O. IX, R. 9 (1) or whether they were limited to enquiry whether 'sufficient cause' for the absence of the minors' guardian was established. It is conceded that minority is not in itself covered by the description "sufficient cause."

Reliance has been placed for petitioners on *Kesho Pershad* v. *Hirday Narain*[1] a case directly in point. Other decisions against the restriction of the justification for restoration of a case to "sufficient cause" are *Somavya* v. *Subbamma* [2] *Gopal Row* v. *Maria Susaya Pillai* [3]. The former of these cases refers explicitly to the case of a minor, whose suit has been dismissed through a guardian's laches. I must follow them in preference to *Venkatrama Aiyar* v. *Nataraja Aiyar* [4] and the cases cited therein on the other side.

I therefore set aside the decision of the Lower Court and direct it to restore the appeal and to hear it again in the light of the foregoing and with reference to the question whether the minor's guardian has been guilty of gross neglect of their interests. The point, on which petitioners now succeed, was not taken in the Lower Courts. There will therefore be no order as to costs to date.

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1. (1880) 6 Cal. L. R. 69.
2. (1903) I. L. R. 26 M. 599.
3. (1906) I. L.R. 30 M. 274.
4. (1912) 24 M. L. J. 239.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Ayling and Mr. Justice Seshagiri Aiyar.

Mohammad Koolayappa Rowthan ... *Appellant* (*Petitioner*.)*

v.

Sheik Abdul Khadir Rowthan and another. *Respondents*—(*Respondents*).

Mohammad Koolayappa Rowthan *v.* Sheik Abdul Khadir Rowthan.

Ayling J.

Criminal Procedure Code, s. 146—Order of attachment—Parties found in joint possession—Without jurisdition.

The Magistrate has no power to order an attachment under s. 146, Cr. Pr. Code when he finds that both the parties are in joint possession.

Appeal under S. 15 of the Letters Patent from the order of the Honourable Mr. Justice Oldfield, dated the 18th day of September 1913 in Criminal Revision Case No. 146 of 1913, preferred against the order of the Sub-Divisional Magistrate of Dindigal in Mis. Case No. 66 of 1911.

S. Swaminadhan for the Petitioner,

Public Prosecutor (*Nugent Grant*) for the Crown.

V. Ratnasomanadhan for the Counter-Petitioner.

The Court delivered the following

Judgment:—*Ayling, J.*:—With all deference to the view of the learned Judge who heard the revision petition I am unable to construe the finding of the Deputy Magistrate as anything, but a finding that both parties were in joint possession. This being so, it seems clear that S. 146 Criminal Procedure Code gives him no jurisdiction to pass an order of attachment. The order must therefore be set aside.

Seshagiri Aiyar, J.:—The petitioner complained to the Sub Divisional Magistrate of Dindigal that the Counter-petitioner was preparing to commit a breach of the peace by forcibly entering upon properties which were in his exclusive possession. The defence was that the properties in dispute were the joint properties of the Petitioner and the Counter-petitioner and "that they are in their joint enjoyment." The Magistrate enquired into the matter and came to the conclusion that the allegation of the Counter-petitioner as regards item 3 was true. He held "that he could not issue an order declaring joint possession." At the same time he directed the attachment of the land included in item 3 under S. 146 of the Code. Against this order, the Petitioner preferred a petition

* L. P. A. 103 of 1913 28th July 1914

Mohammad Koolayappa Rowthan v. Sheik Abdul Khadir Rowthan.

Seshagiri Aiyar, J.

to the High Court. The learned Judge before whom the case was heard was inclined to hold that if the finding of the Sub-Divisional Magistrate was that the parties were in joint possession, S. 146 was not applicable but he was of opinion that the Magistrate did not intend to find such joint possession. I regret my inability to agree in this view. The contention of the Counter-petitioner was that he was in joint possession of item 3 with the petitioner. The Magistrate refers to the fact that the lands were lying waste in Faslis 1320 and 1321, that is up to the end of June 1912. Then he deals with the question as to who cultivated the land after this period and prior to the date of the application. He says that neither petitioner, nor Counter-petitioner was in *actual exclusive possession* of the lands. He concludes on the evidence in favour of joint enjoyment by petitioner and Counter-petitioner. I feel no doubt that by *joint enjoyment* he meant *joint possession* and I cannot accede to the argument of the learned Public Prosecutor that the Magistrate meant to find only joint ownership and that his judgment indicated that he was unable to find that either of the parties was in possession.

On this conclusion of mine, the question for consideration is whether the Magistrate had jurisdiction to pass an order under S. 146 of the Code of Criminal Procedure. That section enables a Magistrate to attach the property if he either finds "that none of the parties was then in such possession" or if he is unable to satisfy himself that either of them was in *such possession*. The term 'such possession' must relate back to clause (1) of s. 145 which lays down that conditions under which actions dealing with disputes as to immoveable property should be taken. Clause (1) speaks of actual possession. Dr. Swaminathan contends that actual possession in that clause means exclusive possession and excludes joint possession. The authorities quoted by him support this view *Nritta Gopal Singh* v. *Chandi Charan Singh* [1], *Makhan Lal Roy* v. *Barada Kanta Roy* [2], *Manik Chandra Chakravarti* v. *Preo Nath Kuar*, [3] See also *Rajendra Narain Roy* v. *Mahommad Arzumand Khan* [4]. None of these cases gives any reason for this restrictive use of the expression. Nor does the earlier

1. (1906) 10 C. W. N. 1088.
2. (1907) 11 C. W. N. 512.
3. (1912) 17 C. W. N. 205.
4. (1905) 9 C. W. N. 887.

Mohammad Koolayappa Rowthan v. Sheik Abdul Khadir Rowthan.

Seshagiri Iyer, J.

decision in *Emperor* v. *Debendra Nath Bose* [5] which says that s. 145 will apply to cases of joint possession give any reason for that position. I am inclined to think that neither s. 145 nor s. 146 applies to cases of joint possession. The object aimed at by the legislature is the prevention of the breach of the peace. This can be secured by asking one of the parties to keep away from the property. But where both parties have been in joint possession and are still prepared to commit a breach of the peace by trying to oust one another, it will not be in the interests of preventive remedy that both should be maintained in possession. It may establish their rights to remain in *status quo*. It will certainly not help the Magistracy in maintaining order and peace that I take to be the reason of the rule why courts have declined to declare the joint possession of the contesting parties. It is not necessary in this case to determine whether under s. 147 one of the parties cannot be restrained from disturbing the other.

My conclusion is that the Sub-Divisional Magistrate had no jurisdiction to pass an order under s. 146 on his finding that the contending parties are in joint possession of the disputed property. I agree that the order should be set aside.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sankaran Nair and Mr. Justice Spencer.

Malamal Vittil Krishnan Nair ... *Appellant* * (*Petitioner*)

v.

Kavalappara Moopil Nair ... *Respondent*

Malamal Vitil Krishnan Nair v. Kavalappara Moopil Nair.

Civil Procedure Code, O. 41, R. 5—Order refusing to stay execution—Appeal against—Sustainability of.

There is no appeal against an order by the appellate Court refusing to stay execution under O. 41, R. 5.

Appeal from the order of the District Court of S. Malabar in C. M. P. No. 127 of 1914 in A. S. No. 34 of 1914, preferred against the decree of the Court of the Temporary Subordinate Judge of Palghat in O. S. No. 17 of 1911.

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5. (1904) 1 C. L. J. 632.

* A. A. O. No 129 of 1914. 27th July 1914.

Malamal Vitil Krishnan Nair v. Kavalappara Moopil Nair.

T. R. Ramachandra Aiyar and *N. A. Krishna Aiyar* for Appellant.

J. L. Rozario for Respondent.

The Court delivered the following

Judgment:—The District Judge passed an order under O. 41, R. 5 refusing to stay the execution of a decree passed by the Subordinate Judge against which an appeal is pending before himself. This is an appeal against his order.

A preliminary objection is taken that no appeal lies. We think the objection is well founded. Mr. Ramachandra Aiyar contends that the order falls within the purview of S. 47 and is therefore appealable. But that section only applies to orders passed by the court executing the decree. In this case the District Court is not the Court executing the decree. See *Ramachandra* v. *Balmukund* [1].

We therefore uphold the preliminary objection and dismiss the appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Oldfield and Mr. Justice Napier.

Vilakathala Raman ... *Petitioner* *
(1st Defendant)

v.

Vayalil Pachu ... *Respondent*
(Plaintiff)

Vilakathala Raman v. Vayalil Pachu.

Civil Procedure Code, S. 151—Inherent power to vacate order—Order recording satisfaction—Secured by fraud.

The Court has inherent power to vacate order recording satisfaction obtained by the gross fraud of the judgment-debtor on the Court.

Petitioner under S. 115 of Act V of 1908 and under S. 15 of Charter Act praying the High Court to revise the order of the Court of the District Munsif of Chowghat in E. P. No. 31 of 1912 in Small Cause Suit No. 405 of 1910 on the file of the Court of the Principal District Munsif of Calicut.

A. Sundaram for Petitioner.

S. T. Srinivasagopalachari for Respondent.

The Court delivered the following

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* C. R. P. 631 of 1912. 24th July 1914.

1. (1904) I. L. R. 29 B. 71

Vilakathala Raman v. Vayalil Pachu.

Judgment.—The revision petition before us statedly asks this Court to interfere only with the Lower Court's order, dated the 27th February 1912. It, however, also contains a prayer for the setting aside of an order directing the petitioner's prosecution, which was, it appears actually passed on the 29th February 1912. We cannot, deal with the order of the 29th February 1912 on this petition.

The order of the 27th February 1912 was one by the District Munsif of Chowghat vacating his previous order recording satisfaction of a decree on the ground that the latter was obtained by the petitioner's gross fraud on his Court. This petition is argued on the ground that the District Munsif had no power to pass such an order.

We should be prepared to sustain the order, as passed under either S. 47 or O. XLVII of the Civil Procedure Code. But it is sufficient that it was passed in the exercise of the Courts inherent power under S. 151 of the Civil Procedure Code to vacate an order obtained by manifest fraud on it. The propriety of such exercise was recognised in *Paranjpe* v. *Kanade* [1] and *Subbaji Rau* v. *Srinivasa Rau* and *Pulliah* [2] and this is sufficient ground for our refusal to interfere.

The Petition is dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Tyabji.

Ayyagiri Veerasalingam ... *Appellant**
(1st Defendant)

Koovur Basivi Reddi and another ... *Respondents*
(Plaintiff and 2nd Defendant.)

Ayyagiri Veerasalingam v. Koovur Basivi Reddi.

Civil Procedure Code, S. 96 Cl. (2)—Decree passed with consent—Meaning of—Decree passed in accordance with compromise notwithstanding objection—Agreement to withdraw suit on defendant executing sale deed—Decree directing execution—Competence of Court to pass—O. 23, r. 3—Relates to suit—Meaning of.

The prohibition contained in S. 96, cl (2) relates only to decrees passed with the consent of parties and cannot be held to extend to decrees passed in accordance with a compromise notwithstanding the objection of one of the parties.

Where the plaintiff agreed to withdraw a suit on the defendant agreeing to execute a sale deed to the plaintiff.

Held, that the decree could be passed compelling the defendant to execute the sale deed.

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1. (1882) I. L. R. 6 B. 148. 2. (1880) I. L. R. 2 M. 264.

* S. A. 541 of 1912. 21st July 1914.

Ayyagiri Veerasalingam v. Koovur Basivi Reddi.

All terms which form the consideration for the adjustment of the matters in dispute whether they form the subject matter of the suit or not become "related to the suit" within the meaning of O. 23, R. 3 and can be embodied in the decree.

Natesan Chetti v. *Vengu Nachiar* (1), *Gobind Chandra Pal* v. *Dwarakanath Pal* (2) *followed.*

Second Appeal from the Judgment and Decree of the District Court of Kistna in A. S. No. 584 of 1910 preferred against the judgment and decree of the Court of the Subordinate Judge of Ellore, Kistna in O. S. No. 52 of 1909.

Zynuddin for T. Prakasam for Appellant.

P. Narayanamurthi and *P. Somasundaram* for Respondents.

The Court delivered the following

Judgment:—There is a preliminary objection taken to the entertainment of the second appeal on two grounds:—One ground is that it is practically a second appeal preferred against the order of the District Court which was passed in appeal from the order of the Subordinate Judge recording a compromise under O. XXIII, R. 3, and that such a second appeal is prohibited by O. XLIII, R. (m) and S. 104, cl. (2)—The short answer to this is that there was no appeal to the District Court against the order of the Subordinate Judge recording the compromise nor is the present second appeal against any order of the District Court passed in appeal against any such order of the Subordinate Judge. The appeal and second appeal are respectively from the decree of the Subordinate Judge passed in accordance with the compromise agreement after recording it and from the decree of the District Judge on appeal against the Subordinate Judge's decree.

The next contention is that S. 96, cl. (3) prohibits an appeal from a decree passed by the Court with the consent of the parties. The answer to this objection is that the decree itself was not passed by the consent of parties but the Court held that there was a consent of the parties to the terms of the compromise agreement which was recorded and it passed a decree in accordance therewith notwithstanding the objection of one of the parties.

The preliminary objection fails.

Coming to the merits of the second appeal, the appellant's learned Counsel contended that under the compromise agreement the first defendant agreed only to execute a sale deed to the

1. (1909) I. L. R. 33 M. 102. 2. (1908) I. L. R. 35 C. 837.

Ayyagiri Veerasalingam v. Koovur Basivi Reddi.

plaintiff outside the Court in consideration of the plaintiff's withdrawing the suit, and that he did not agree to a decree being passed compelling him (the 2nd defendant) to execute such a sale deed. Whether he agreed to the Courts passing a decree or not, compelling him to execute a sale deed is not relevant. The real question is whether the suit was adjusted by a compromise, one of the terms of which was that the 1st defendant should execute such a sale deed and whether a decree can be passed in accordance with such a term. We think that it could be done.

Another contention put forward by the appellant's Counsel Mr. *Zynuddin* who argued the case with ability and fairness was that such a term does not "relate to the suit" and hence the decree cannot embody it. Though certain earlier decisions were inclined to the view that any terms which did not directly concern the subject matter of the suit could not be embodied in the decree, we prefer to follow the later cases, in *Natesan Chetti* v. *Vengu Nachiar* [1] and *Gobind Chandra Pal* v. *Dwarka Nath Pal* [2] which hold that all terms which form the consideration for the adjustment of the matters in dispute in the suit. Whether they form part of the subject matter of the suit or not do become related to the suit and can be embodied in the decree.

In the result the second appeal fails and is dismissed with costs of the first Respondent.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Tyabji.

Raman Nambiar ... *Appellant* * (*Plaintiff.*)

v.

Raman Nambiar ... *Respondent.* (*Defendant.*)

Raman Nambiar v. Raman Nambiar.

Malabar Law—Karnavan—Melcharth—Granted before expiry of Kanom—Necessity or benefit to be shewn.

A melcharth granted by a Karnavan before the expiry of the term of the kanom cannot be supported unless there was adequate necessity or the grant is shown to be for the benefit of the Tarwad.

Second Appeal from the decree of the District Court of North Malabar in A. S. No. 359 of 1910 preferred against the

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1. (1909) I. L. R., 33 M. 102. 2. (1908) I. L. R., 35 C. 837.

* S. A. 727 of 1912. 16th July 1914.

Raman Nambiar v. Raman Nambiar.

decree of the Court of the District Munsif of Tellicherry in O. S. No. 449 of 1908.

K. Govinda Marar for Appellant.

C. V. Ananthakrishnayyar for Respondent.

The Court delivered the following

Judgment:— The learned District Judge's view seems to be that the alienee from a Karnavan under a Melcharth granted before the expiry of the terms mentioned in previous kanom deeds need not prove adequate necessity for the grant of such a Melcharth and that even if the Melcharth was not a "wise" transaction, it cannot be set aside at the instance of the succeeding Karnavan unless it is proved that it was a transaction intended to benefit the Karnavan or his sons at the expense of his family or to defraud the Tarwad. This view is opposed to the decisions of *Cheria Chinkandan* v. *Krishnan Nambiar* [1] and S. A. No. 877 of 1911. The Melcharth cannot be upheld unless there was adequate necessity or unless the grant of it was beneficial to the Tarwad. The learned Judge's decision is vitiated by his having misdirected himself or the law governing the consideration of the question involved. We set it aside and remand the case for the decision of the appeal before him *de novo*. The costs in this court will abide and follow the result.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Tyabji.

Bangarasami Aiyangar ... *Appellant (1st Defendant.)*

v.

A. R.A. A.R. S. M. Somasundaram Chettiar and others ... *Respondents*

Bangarasami Aiyangar v. Somasundaram Chettiar.

Deed—Recital of execution by three—Execution by only two—Liability of the executants—Question of fact.

Where a document recites that it is executed by A, B & C but only A & B execute it, the question whether A & B agreed to be liable only if C also joined is a question of fact to be decided according to the circumstances of each case and cannot be the subject of a second appeal unless there is no evidence to justify the finding of the court below.

Sivasamy Chetty v. *Sevagan Chetti* 1 *Krishnama Chariar* v. *Narasimhachariar*

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1. (1912) 15 M. L. T. 600.

1. (1901) I. L. R. 25 M. 389.

2. (1908) I. L. R. 31 M. 114.

* S. A. 874 of 1911.

16th July 1914.

Second Appeal from the decree of the Court of the Subordinate Judge of Tinnevelly in A. S. No. 562 of preferred against the decree of the Court of the District Munsif of Tinnevelly in O. S. No. 29 of 1908.

K. Srinivasa Aiyangar and *S. Krishnamachari* for Appellant.

C. S. Venkatachari for Respondent.

The Court delivered the following

Judgment the question whether when a document which recites that it was executed by A, B and C is executed by A and B alone, whether in such a case, A and B agreed to be liable under it only if C also joined in executing it is a question of fact to be decided on the circumstances of each particular case *Sivasami Chetty* v. *Sevagan Chetti*[1] and *Krishnama Chariar* v. *Narasimha Chariar*[2]. In this particular case, the Lower Appellate Court has after considering the circumstances and probabilities arrived at the conclusion that the 1st defendant (the appellant before us) agreed to be liable under Exhibit A notwithstanding that one Desika Chariar mentioned in the recital as a co-executant did not sign it. Though it must be admitted that the Judgment is not quite satisfactory, we cannot say that there is no evidence on which the Lower Appellate Court could have arrived at the conclusion at which it arrived. The plaintiff's 1st witness says that he made a demand on the 1st defendant for money due under the particular pronote and the 1st defendant promised to pay up sum, thus impliedly admitting that his liability under it was not made conditional on Desikachariar's joining in its execution. We are not satisfied that the Subordinate Judge has misconstrued the documentary evidence in any material particular.

We, therefore, dismiss this second appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Sundara Iyer.

Lakshminarayana Panigrahi ... *Petitioner** (*Plaintiff*)

v.

Pasupureddi Gopi ... *Respondent* (*Defendant.*)

Lakshminarayana Panigrahi v. Pasupureddi Gopi.

Vizagapatam Agency Rules, R, 17. 20—Order declining to entertain special appeal—Not decree—Not revisable by High Court.

1. (1901) I. L. R. 25 M. 389. 2. (1908) I. L. R. 31 M. 114.

*C. M. P. No. 747 of 1911. 20th February 1913.

Lakshminarayana Panigrahi v. Pasupureddi Gopi.

Under Rule 20 of the Vizagapatam Agency rules, the High Court has no power to direct the Agent to revise his order declining to entertain a special appeal under rule 17 as such an order is not a decree within the meaning of Rule 20.

Petition praying that in the circumstances stated therein the High Court will be pleased to direct the agent to the Governor at Vizagapatam to review his order in D. Disposal No. 669 of 1910 (against the decree of the Court of the Special Assistant Agent, Parvatipur, in Civil Appeal No. 25 of 1910 preferred against the decree of the Court of the Agency District Munsif, Gunupur, in O. S. No. 72 of 1910.)

V. Ramesam for the Petitioner.

P. Narayanamurti for the Respondent.

The Court made the following

Order. This is a petition under rule 20 of the Vizagapatam Agency rules asking us to direct the agent to review his order refusing to admit an appeal presented to him against an appellate judgment of a Special Assistant Agent reversing the judgment of the Agency District Munsif of Gunupur. The appeal against the Munsif's judgment was preferred under Rule No. 16; Rule No. 17 provided that the appellate decision of Divisional Assistants shall be final provided that the agents shall be at liberty, for special reasons to be recorded, to admit a special appeal in his court within the time prescribed for the admission of a regular appeal. Rule No. 20 gives this court the power to direct the agent to review his judgment in the case of decrees passed by him in appeals from the decrees of the subordinates. We do not think that the agent's order in this case can be regarded as a decree. Mr. Ramesam contends that the agent's order was one disposing of an appeal against the appellate decree of the Divisional Assistant and that it is therefore a decree, but Rule No. 17 expressly provides that the decision of a Divisional Assistant in an appeal shall be final. Rule No. 17 cannot therefore be read as giving a right of appeal against such a dicision. The rule no doubt empowers the agent for special reasons to admit a special appeal. The meaning of this must in our opinion be taken to be that, if the Agent thinks fit, the party should have a right of appeal. In other words a second appeal will lie with the agent's leave. This is the only way of reading the latter part of Rule No. 17 consistently with the

former part making the appellate decisions of Divisional Assistant Agent final. Rule No. 17 cannot be regarded as conferring on the party concerned a limited right of appeal. He has no right of appeal at all except with the leave of the Agent: The Agent's order therefore was one refusing leave to appeal as there were no special grounds for giving it. Such an order cannot be held to be a decree. Rule No. 20 is therefore inapplicable. We dismiss the petition with costs.

Lakshminarayana Panigrahi v. Pasupureddi Gopi.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Sundara Iyer.

Tangirala Chiranjivi, being minor by his mother and next friend Lakshmamma and others — *Appellants* (Plaintiffs 1 and 2 and the sons of the deceased 3rd Plaintiff.)*

v.

Raja Manikya Rao Rajya Lakshmamma late a minor but now of full age (*Vide* order, dated 17-4-12 in C. M. P. No. 726 of 1912 and order, dated 31-7-12 in C. M. P. No. 1456 of 10 and others. — *Respondents (Defendants Nos. 2,7 to 12 and 14 to 16.)*

Tangirala Chiranjivi, v. Raja Manikya Rao.

Religious Endowments—Temple—Dharmakarta—Power to dismiss—Vritikar—Vriti for reciting Veda,—Sex, ignorance of Veda and minority if disqualification—Inam granted by Zamindar and confirmed by Government—Not resumable by temple trustees—Right of resumption in Government.

The trustees have no power to resume an inam granted to certain Vritikars of the temple for reciting the Veda when the inam is not one granted to the temple but was granted to the Vritikars themselves conditional on their performing the service by the zamindar and was confirmed by the Government, the right of resumption *prima facie* being in the Government.

Whether the trustees could dismiss the Vritikars is a question to be determined upon the evidence in the case and not a matter for assumption.

It cannot be assumed that a minor, a female and a person unlearned in the Vedas would lose the right to the service in the temple; services being often performed by proxies, the onus would be on the Dharmakartas to show that those are disqualifications.

Appeal from the decree of the District Court of Guntur in O. S. No. 28 of 1905.

* A. 201 of 1909. 17th April 1913.

Tangirala Chiranjivi, v. Raja Manikya Rao.

The Court delivered the following

Judgment:—The District Judge does not seem to have appreciated the real questions arising for decision in the case. The lands in question were admittedly granted to certain Vritikars for reciting the Vedas in a temple. The Inam title-deed, Exhibit A, was granted to the Vritikars. It does not appear that the temple had any right of property in the lands. The inam being a conditional one granted by a *Zamindar* and confirmed by the British Government, the right of resumption would be in Government. The trustees did not state how they had any right to take possession of the lands. Again, the Judge seems to have assumed that the trustees had the right to dismiss the Vritikars. We express no opinion on the question whether in the case of such a grant the trustees would have such a right. But the matter was one which should have been tried and could not be decided on any assumption. Again, the District Judge has assumed that a minor, a female and a person unlearned in the Vedas would lose the right to the service in the temple; there is no basis for the assumption; the onus would be on the Dharmakartas to prove any such disqualification; services in temples are often performed by proxies.

Again, the Judge did not try the question whether the plaintiffs neglected or refused to have the services properly performed. Further, unless the Dharmakartas could prove their right to take possession of the lands, the plaintiff's suit must succeed, even if they failed to perform the services or forfeited their right to the services; the right of resumption of the inam being *prima facie* in Government alone. As the case has not been properly tried, we set aside the decree of the Lower Court and remand the suit for fresh disposal according to law after recording all the evidence that either party may adduce. The costs of this appeal will abide the result.

PRIVY COUNCIL.

Present:—Lords Sumner and Parmoor, Sir John Edge and Mr. Ameer Ali.

On appeal from the Court of the Judicial Commissioner of Oudh at Lucknow.

Musammat Amir Begam ... *Appellant* *

v.

Khwaja Saiyed Badruddin Husain and others... *Respondents.*

Musammat Amir Begam v. Khwaja Saiyed Badruddin Husain.

Arbitration—Award—Where separable portion bad—Validity of—Misconduct of arbitrator—Whether irregularity in procedure amounts to—Dishonesty and partiality—Whether arbitrator bound to take notes of proceedings before him—Examination of arbitrator.

Where an award was questioned both on the ground of corruption and irregularity of procedure, the latter consisting in not making proper inquiry as to the matters in dispute and keeping adequate notes of the proceedings.

Held, that if, irregularities in procedure could be proved which would amount to no proper hearing of the matters in dispute, there would be misconduct sufficient to vitiate the award without any imputation on the honesty or impartiality of the arbitrator but that the burden of proving them was on the party that alleged the existence of such irregularities and that in the present case the burden had not been discharged.

That though it is generally desirable that an arbitrator should make and retain for subsequent use if necessary, notes of the proceedings before him, the absence of such notes is not a ground for setting aside an award at the instance of a party who was summoned to appear and must be held to have known the general course of procedure did not make any protest until after the making of the award with the terms of which she was not satisfied.

Held also, when a matter has been considered by the arbitrator and a decision given it cannot be questioned unless the charge of corruption or misconduct is established but: where he decides a matter which is clearly outside his power the whole award would be bad unless that portion of the award is separable from the rest.

It is well recognised law that when a separable portion of the award is bad, the remainder of the award if good can be maintained.

Held further, the limitations applicable to the evidence of an arbitrator as a witness in a legal proceeding to enforce his award are stated in the case of *Buccleuch* v. *The Metropolitan Board of Works* 1.' but where charges of dishonesty are made any relevant evidence which he can give is properly admissible provided that evidence admitted as relevant on a charge of dishonesty or partiality is not used for a different purpose *viz.* to scrutinize the decision of the arbitrator on matters within his jurisdiction and on which his decision is final.

That a charge of corruption if made should be put fairly and squarely to the arbitrator so as to enable him to give a direct answer or explanation.

That the charge of corruption or partiality was not made out. The method and amount of valuation and materials for such valuation adopted by the arbitrator

* 27th March, 1914. 1. (1872) L. R. 5 H. L. 418.

Musammat Amir Begam v. Khwaja Saiyed Badruddin Husain.

were matters within his discretion and in the absence of proof that he was influenced by any corrupt motive, the mere fact that in every matter, his decision was in favour of one of the parties was not sufficient to support a charge of corruption.

Buccleuh v. *The Metropolitan Board of Works* (1) explained.

Appeal from an Order and a Decree of the Court of the Judicial Commissioner, dated Aug. 15, 1911 reversing an Order and Decree of the Court of the Subordinate Judge of Lucknow, dated May 5, 1911.

The facts of the case have been sufficiently dealt with in their Lordships' Judgment.

De Gruyther, K. C. and Dube for the appellants contended that the arbitrator did not decide but assumed the validity of the will. Under the terms of reference he had no power to divide the property by specific allotments, but duly to settle the respective shares of the claimants. He was not empowered to decide questions of title to property as between the estate of the deceased and third parties. He misconducted himself in the allotments he made to the claimants by deliberately undervaluing the property allotted to Badruddin and by overvaluing the property allotted to others as also in deliberately allotting to Badruddin the best and unencumbered property. He also deliberately allotted to the appellant's share a fictitious debt of Rs. 4000 and refrained from giving her money admittedly due to her. The award was bad as it was not based upon enquiry or evidence given in the presence of the parties or anything approaching a judicial investigation and rested on arbitrary assumptions of the arbitrator or on assumed personal knowledge. The submission to arbitration was made in ignorance of the fact that the person named as arbitrator was an attesting witness to the will in dispute.

Reference was made to *In re Enock Zacty Ky, Rock & Co's Arbitration* 2 Sched. II. Para 20 of Civil Procedure Code. *Kali Prosanno Ghose* v. *Rajani Kant* 3.

Upjohn, K. C. and Lowndes for the respondents contended that the award was good and binding between the parties.

The arbitrator did not abuse the powers entrusted to him by the reference. He was not guilty of any misconduct which could vitiate the award.

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1. (1872) L. R. 5 H. L. 418.

2. (1910) Q. B. 327. 3. (1897) I. L. R. 25 C. 141.

Reference was made to Ss. 21 and 47 of Act V of 1908.

De Gruyther in reply.

The Judgment of their Lordships was delivered by

Lord Parmoor.—This is an appeal from a decree of the Court of the Judicial Commissioner of Oudh, dated 15th August 1911, reversing a decree of the Subordinate Judge of Lucknow passed by him upon an application by Respondent (1) for the filing of an award.

On the 6th of May 1909, one Khwaja Farid-ud-din Husain (hereinafter called the testator) died at Lucknow, leaving considerable property, and had as heirs, according to Mahommedan law, a full sister (the Appellant herein), two step-brothers, Respondents (2) and (3), two step-sisters Respondents (4) and (5), and a widow Respondent (6). Shortly before his death, the testator made a will by which he appointed Respondent (1) his executor, and, as he was entitled to do by Mahommedan law, bequeathed him one-third of his property. After the death of the testator disputes arose between the parties interested, and litigation was commenced. On the 6th August 1909, the matters in dispute were referred to the sole arbitration of Munshi Sakhawat Ali under a submission of reference in the following form :—

"Whereas there exists a dispute amongst us, the executants, regarding the estate of Khwaja Farid-ud-din, deceased, and the deed of will dated the 20th April 1909, we, the executants, have, of our own accord, appointed Munshi Sakhawat Ali as a referee for the purpose of settling the matters in dispute. We agree and record that the said referee may decide it in whatever way he may deem proper, we, the executants, shall remain bound by the award. Therefore we have executed these few presents by way of a deed of agreement so that they may serve as an authority."

The arbitrator entered upon the reference and published his award on the 16th July 1910. He confirmed the appointment of respondent (1) as executor, and gave him one-third of the property. The remaining property fell to be divided according to Mahommedan law. The parties were entitled in the following shares :—

The Appellant to a third share, the Respondents (1) and (6) jointly to a moiety, the Respondents (2) and (5) to a sixth share. The arbitrator then proceeded to distribute the property in proportion to the shares to which the respective parties were entitled and for this purpose to make a valuation. The property so valued amounted in the aggregate to 91,042 rupees. There was

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a further item of 4,000 rupees, which was in no sense an ascertained or settled amount, but was based on a right to claim a rendition of accounts from a certain Ahmad Khan, and this item, for what it was worth, was allotted to the appellant. The respondents (1) and (6) in respect of their joint half share were allotted property valued at 45,010 rupees. The appellant in addition to the above item of 4,000 rupees was allotted property valued at 30,879 rupees, and respondents (2) and (5) were allotted property valued at 15,153 rupees. On the face of the award the distribution appears to be fairly made. So far as there is any advantage it is in favour of the appellant. This apparent advantage is referred to and explained by the arbitrator in his award.

At the time of the testator's death there was a considerable mortgage (20,000 rupees) affecting certain portions of his property. The arbitrator recognised that the allottees of the mortgaged property would be under a disadvantage with an apprehension of possible loss. He therefore decided that the debt of 20,000 rupees and its interest should, as among the parties entitled under the will, be a charge on the entire property of the testator, and proportionately on all the co-sharers, and that each co-sharer should be liable to pay in proportion to his share, and that each co-sharer should as soon as possible pay his proportionate share both capital and interest to the creditor. Whether this provision in the award did give full protection to the allottees of the mortgaged property, it is not within the province of Their Lordships to decide. It is sufficient that the matter was considered by the arbitrator and his decision cannot be questioned unless the charge of corruption or misconduct is established. The award further purported to assign specific lands in the *Zamindari* of Rasulabad by way of partition, a matter clearly outside the power of the arbitrator and which would render his award invalid, unless this portion of his award is separable from the rest. In the opinion of Their Lordships there is no difficulty whatever in separating this portion of the award from the rest. It is well recognised law that when a separable portion of an award is bad, the remainder of the award, if good, can be maintained. In this respect Their Lordships agree with the judgment of the Court of the Judicial Commissioner of Oudh, and it becomes necessary to consider the grounds on which the remainder of the award has been attacked.

On the 10th June 1910 respondent (1) made an application to the Court of the Subordinate Judge of Lucknow to file the award in Court under paragraph 20 of the Second Schedule of the Code of Civil Procedure Act, 1908. On such an application the Court, if satisfied that the matter has been referred to arbitration and that an award has been made thereon, and that no ground such as is mentioned or referred to in paragraphs 14 and 15 is proved, shall order the award to be filed and shall proceed to pronounce judgment according to the award. Paragraph 14 states the grounds on which the Court may remit the award to the reconsideration of the same arbitrator or umpire. Paragraph 15 states the grounds on which alone an award shall be set aside. The first of these grounds is corruption or misconduct of the arbitrator or umpire. It was on this ground that the Subordinate Judge refused to order the filing of the award and disallowed the application of the respondent (1) who had been treated as plaintiff in the proceedings.

On the 7th September 1910 issues were framed by the Subordinate Judge. The only material one is: Is the award vitiated by the misconduct of the referee as alleged under the paragraphs 9 to 20 of the first defendant's (the appellant's) written statement ?

The misconduct alleged against the referee was twofold :—

(1st) That the referee had acted corruptly and dishonestly in his capacity of judge.

(2nd) That the proceedings in the reference had been conducted in such a way that the matters in dispute had not been properly tried.

Their Lordships will deal first with the less important point of irregularity of procedure.

If irregularities in procedure can be proved which would amount to no proper hearing of the matters in dispute there would be misconduct sufficient to vitiate the award without any imputation on the honesty or impartiality of the arbitrator. In the present case it was alleged on behalf of the appellant that there had been no proper inquiry, since the parties had not been properly summoned to appear before the arbitrator, and the appellant had not had an opportunity of meeting the case set up by the respondent (1). The burden of proving this allegation was upon the appellant and other defendants at the trial before

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the Subordinate Judge. The only relevant witness called on behalf of the appellant was Shaban Ali, who admitted in cross-examination that he was sent for by the arbitrator on several occasions and questioned in respect of the value of immoveable property. As against the evidence, which in itself is quite insufficient to prove the alleged irregularities, the arbitrator stated on oath that he invited all parties to put in written statements before him, but that they declined to do so; that he was never asked by any of the parties to hear oral evidence and that no oral evidence was tendered at any time, and that he got little or no assistance from any of the parties in making his inquiries. It is, however, unnecessary in Their Lordships' opinion, to further analyse this evidence since they agree with the Court of the Judicial Commissioner of Oudh that the allegations of irregularity in procedure were not proved against the arbitrator and that there is no justification for the strictures passed by the Subordinate Judge upon the conduct of the arbitrator. Further severe comment was made that the arbitrator did not make and retain any adequate notes of the proceedings. No doubt it is generally desirable that an arbitrator should make and retain for subsequent use, if necessary, notes of the proceedings before him; but there is no warrant for holding that in the absence of such notes an award should be set aside at the instance of one of the parties, who must be held to have known the general course of procedure, and who did not make any protest until after the making of the award with the terms of which she was not satisfied.

The last point, and the most important, is the grave charge that the arbitrator acted dishonestly and with partiality in conducting the inquiry and making his award. This charge was found to be established by the Subordinate Judge. The main evidence relied upon to support this conclusion was that given by the arbitrator, himself in cross-examination. An arbitrator, selected by the parties, comes within the general obligation of being bound to give evidence, and where a charge of dishonesty or partiality is made, any relevant evidence which he can give is without doubt properly admissible. It is, however, necessary to take care that evidence admitted as relevant on a charge of dishonesty or partiality is not used for a different purpose; namely, to scrutinise the decision of the arbitrator on matters within his

jurisdiction, and on which his decision is final. The limitations applicable to the evidence of an arbitrator as witness in a legal proceedings to enforce his award, are stated in the case of *Buccleuch* v. *The Metropolitan Board of Works* 1, but where charges of dishonesty are made the Court would reject no evidence of an arbitrator which could be of assistance in informing itself whether such charges were established.

In the opinion of their Lordships the Subordinate Judge did not take sufficient care in the discrimination of the purpose for which the evidence was admissible, and utilised evidence relevant on the charge of corruption to criticise methods adopted by the arbitrator in determining the quantum of his valuations. The course adopted in the cross-examination of the arbitrator was not satisfactory. There was a prolonged and critical examination into the details of figures, used by the arbitrator, in making his award, but the charge of corruption was not put fairly and squarely to him, so as to enable him to give a direct answer or explanation. It is not surprising, that a cross-examination so conducted should lead to a certain amount of confusion and contradiction, but Their Lordships cannot find in this respect any warrant for supporting the grave charges of corruption and partiality.

The distribution and valuation of the testator's property amongst the parties entitled are stated without ambiguity on the face of the award. In the first place the arbitrator sets out the details of the property allotted to respondent (1) and in each instance his estimation of value. The first property allotted is the entire village of Mohi-ud-dinpur, *alias* Hajiganj and the estimated value is 28,785 rupees. In respect of this allotment and valuation three charges are made against the arbitrator. It is said, first, that Hajiganj was a choice portion of the property of the testator and that its allotment to Respondent (1) showed partiality in his favour to the detriment of the Appellant. The arbitrator's answer is that it was undesirable to divide Hajiganj and that the only way in which division could be avoided was by its allotment in entirety to Respondent (1). This explanation is in itself reasonable and effectively answers the charge.

1. (1872) L. R, 5 H. L. 418.

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The second allegation is of undervaluation. The arbitrator is said to have dishonestly assessed this property at a low valuation intending to give an unfair preference to Respondent (1). The evidence adduced in support of this charge is that the valuation was made on the patwari's figures to the rejection of those appearing in the accounts of the testator, the former figures giving a lower rate of profit income, and thereby diminishing the capitalised value. Their Lordships can see no reason for not accepting the arbitrator's explanation given in cross-examination. He considered the Patwari's figures more likely to form an accurate basis for valuation than those in the private accounts, and stated that there were reasons which made him think that the private accounts were not satisfactory. This is just one of the matters on which an arbitrator is bound to exercise his discretion in estimating value, and the evidence is quite insufficient to prove that the arbitrator's choice of materials was influenced by a corrupt motive. Apart from the charge of corruption, it was beyond the competency of the Subordinate Judge to scrutinise the estimate of value appearing on the face of the award. Their Lordships can find no reason for coming to the conclusion that the basis of valuation suggested by the Subordinate Judge is preferable to that of the arbitrator.

The third charge made under the head of Hajiganj is that in the valuation, no account was taken of the Zamindar's office said to be worth 500 rupees. The arbitrator's answer is that it was included as part of the village property, and that in any case it was covered by the addition of 2,000 rupees which he had made to the value of the village as a whole.

The second property allotted to Respondent (1) consists of houses at Lucknow. It was said that the arbitrator had unfairly undervalued this property to the detriment of the Appellant, and that he had included in his valuation a house which belonged to the Appellant and not to the testator. There is no weight in the criticism made by the Subordinate Judge of the valuation of this property when the actual method adopted by the arbitrator is understood. The arbitrator having a difficulty in obtaining any satisfactory basis for fixing a valuation invited the parties to send in tenders, stating the price they would be prepared to pay for each of the houses. The only party who tendered for all the houses was respondent (1), whose tender in the aggregate amounted to a

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price of 11,900 rupees. The Appellant sent in a tender for three of the houses at a slightly lower figure under each head, but the difference is so small as to be negligible. The arbitrator fixed the value at 11,800 rupees, reducing the tender price in the case of two houses by the comparatively insignificant sum of 50 rupees. The method of valuation adopted by the arbitrator was within his discretion, and it is impossible to find that the small alteration in the case of the two houses was inconsistent with honesty and impartiality.

It was necessary for the purpose of making his award that the arbitrator should determine whether or not to include in his distribution of property the house at Lucknow claimed by the Appellant. He gave his reasons for the decision at which he arrived. He knew that the house in question had been assigned to the appellant many years ago under a deed of compromise, but found that the testator had not given up possession, always treating the house as his own and mentioning it in his will as a portion of his estate. He came to the conclusion that the testator, notwithstanding the deed of compromise, had a good title by adverse possession, and that the appellant's claim could not be sustained. He may have been right or wrong in the conclusion he arrived at, but Their Lordships find no warrant for the inference that he was in any way actuated by a dishonest motive. If he was wrong and the house was not the property of the testator, its inclusion in the award might be detrimental to Respondent (1), but could have no effect whatever in defeating the title of the true owner. In addition to Hajiganj and the house property the arbitrator allotted to Respondent (1) certain properties of comparatively small importance. Having regard to the decision at which Their Lordships have arrived on the more important portions of the property allotted to Respondent (1), it is unnecessary to follow under these heads the criticisms of the Subordinate Judge, which denote no more than a difference of opinion from the arbitrator on questions not within the jurisdiction of the Subordinate Judge to determine. No attack was made on the allocation of household furniture, cash and ornaments in Lucknow, or on their estimated value of 4,200 rupees.

Having allotted his share to Respondent (1), the arbitrator next proceeds in his award to allot her share to the Appellant,

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and to estimate the value of such share. There are three heads. The entire village of Kundri; a share in the village of Rasulabad; and a sum of 4,000 rupees. The testator's share in the village of Rasulabad was at this time subject to a considerable mortgage of 20,000 rupees, and it is alleged on behalf of the appellant that the arbitrator acted dishonestly in allotting to the Appellant property subject to the disability of the mortgage; that he unfairly overvalued the testator's property in Rasulabad; and that he must have known that the allocation of the sum of 4,000 rupees was practically illusory. In the allotment of the testator's share in the village of Rasulabad, the arbitrator was asked by Respondents (2) to (5) to give them a share in Rasulabad adjoined to their share in Mahal Pachhim which they already possessed. The award shows that he complied with this request. The question, therefore, arises whether there is any evidence of dishonesty in his allotting the remaining share of the testator's property in the village of Rasulabad to the Appellant. The Appellant was already a co-sharer in Mauza Rasulabad, holding a share in co-tenancy with the testator. It was, therefore, quite reasonable that the arbitrator should assign a share to the appellant of the testator's property in that village. If the allocation under the above circumstances was properly made, the disability attached to the mortgage could not be avoided. It was necessary that some of the parties should be subject to this disability, and the matter was obviously present to the mind of the arbitrator, who in his award provided against an apprehension of loss by deciding that the mortgage debt and its interest should be a charge on the entire property of the testator, and proportionately to all the co-sharers, each co-sharer being liable to pay in proportion to his share, and that each co-sharer should so soon as possible pay his capital and interest to the mortgagee. Their Lordships have already referred to this portion of the award, indicating their opinion that the arbitrator had dealt with the liability of the mortgaged property, providing what in his opinion appeared to be the best remedy. Under these circumstances Their Lordships can find no evidence for the alleged dishonesty in the allotment of a share of the mortgaged property to the appellant, and agree in the decision of the Court of the Judicial Commissioner.

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Their Lordships have found some difficulty in understanding on what ground the Subordinate Judge has based his finding that the Rasulabad property was dishonestly over-valued. In his criticism on the valuation he states that the referee has valued the entire estate of the deceased at 95,042 rupees, but this in itself is an error, since it is clear on the face of the award that the estate was valued for distribution at 91,042 rupees, and that the additional sum of 4,000 rupees was only thrown in as an item which might possibly be recovered on a claim for a rendition of accounts from Ahmad Khan. This initial mistake affects the subsequent inference and Their Lordships can find no evidence of dishonesty in the detailed criticism of the arbitrator's figures. The Subordinate Judge places considerable weight on the allotment of 4,000 rupees to the appellant as an element of misconduct in the arbitrator. It was objected that this was at best a doubtful item and ought not to be estimated in calculating the value of the appellant's share. The answer to this objection appears on the face of the award. In calculating the value on the appellant's share of the testator's property, this sum was not taken into account, but thrown in as an additional item after the appellant had been allotted property estimated at 30,879 rupees, in itself rather more than her third share of the valued property.

Ahmad Khan was a Karinda in the employ of the testator, and had been collecting his rents. It was alleged before the arbitrator that this man had money in his possession which was owing to the estate, and for which he had not accounted. Some figures were placed before the arbitrator, but there was no reliable evidence either of liability or of amount. Ahmad Khan refused to appear before the arbitrator to give any explanation of his accounts, and he was not called at the trial before the Subordinate Judge. The respondent No. (1) had given Ahmad Khan acquittance for any sums that might be due to him, and the arbitrator was informed by Mr. Mohammad Fasih, a pleader, and the son-in-law of the appellant, that he, too, had given Ahmad Khan discharges, as he desired to get Ahmad Khan in his power to support the appellant's claim for mutation. Under these circumstances, what was the arbitrator to do? If he had made no reference to the matter in his award, no question would have arisen, and, on the face of the award, the

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appellant would have had a full one-third share of the valued property. The course he took was evidently intended to be in favour of the appellant for what it was worth, and the finding of the Subordinate Judge that there was evidence of dishonesty appears to be founded on a misapprehension of the terms of the award in relation to the distribution of this item.

It was argued before Their Lordships by counsel for the appellant that, although in each instance the evidence of dishonesty might not amount to more than a case of suspicion, the aggregate effect would support the charge of corruption, since in every instance the decision was given in favour of Respondent (1), and to the detriment of the Appellant. In Their Lordships' view, this is not an accurate summary, but, in any case there would be no sufficient ground to infer such a grave charge as dishonesty and partiality against an arbitrator unless much stronger evidence was adduced in support of the particular instances relied upon than was forthcoming in the present case. It is just to the arbitrator to say that, in Their Lordships' view, the charges of dishonesty and partiality have entirely failed.

Their Lordships agree with the judgment of the Court of the Judicial Commissioner of Oudh, and will humbly advise His Majesty to dismiss the appeal with costs.

Solicitor for appellant:—*Douglas Grant.*

Solicitors for respondents:—*Watkins and Hunter.*

PRIVY COUNCIL.

Present—Lords Moulton and Parker of Waddington, Sir John Edge and Mr. Ameer Ali.

On Appeal from the High Court at Calcutta.

Rai Dwarka Nath Sarkar Bahadur and another ... *Appellants* *

v.

Haji Mohamed Akbar and others ... *Respondent.*

Rai Dwarka Nath Sarkar Bahadur v. Haji Mohamed Akbar.

Partnership—Suit for dissolution of—Duty to produce accounts—Accounts taken in the absence of—Application for discovery refused—Propriety of—Reference by surviving partners—Binding nature of—Acquiescence in the benefits of—Damages for improper reference—Difference between amount payable under award and amount claimed, awarded as damages—If justifiable.

For the purpose of working out a partnership decree, each party to the action is bound to produce and discover all documents in his possession relating to the partnership and where partnership accounts had been taken in the absence of such

* 17th May 1914.

accounts, plaintiff's application for discovery having been refused their Lordships upheld the order of the High Court directing accounts to be taken afresh after production of the accounts.

Held, however, that the question whether the legal personal representatives of a deceased partner were bound by a reference by the surviving partners in relation to a partnership contract was not a pure question of law to be decided without reference to the facts of the case and the High Court was in error in permitting the question to be raised for the first time in appeal. The contract which was not in evidence might have contained a submission binding on the representative; even if it did not and the agreement to refer was not originally binding it might have become binding on them by their acquiescence therein or their acceptance of benefits thereunder.

Held, further that assuming the agreement to refer was not binding there was no justification for the court giving relief on the footing that the agreement was binding but was negligently and improperly entered into and awarding as damages the difference between the amount originally claimed and the amount payable under the award, throwing the onus of proving that it was any less sum on the partners that improperly joined the reference.

Appeal heard Exparte from a Judgment and Decree of the High Court, dated March 21, 1910, reversing a Judgment and Decree of the Court of the Subordinate Judge of Madia, dated September 24, 1907.

The facts of the case are sufficiently set forth in Their Lordship's Judgment.

Parikh appeared for the appellants. The respondents did not appear.

The judgment of their Lordships was delivered by

Lord Parker of Waddington.—This was a partnership action instituted by the legal personal representatives of a deceased partner against the surviving partners. By the decree, dated 31st May 1906, as varied by the order of the High Court, dated 26th March 1907, it was directed that the Commissioner be appointed for the purpose of taking the accounts therein referred to, being the usual partnership accounts. The Commissioner made his report on the 14th August 1907 and various objections to it were filed. On the 24th September 1907 the Subordinate Judge overruled these objections and confirmed and gave relief on the footing of this report. The order of the Subordinate Judge was appealed. On such appeal two points were decided by the High Court. In the first place such Court decided that the report of the Commissioner was unsatisfactory and that the accounts as taken by him were not properly taken or supported by proper evidence and must be investigated afresh. In this respect, after

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careful consideration, Their Lordships see no reason to differ from the High Court. Without going into detail, it will suffice to say that the accounts were taken without production or discovery of the partnership books and documents. For the purpose of working out a partnership decree each party to the action is bound to produce and discover all documents in his possession relating to the partnership, and an application by the plaintiff in the action for discovery of the documents in the possession of the present appellants appears to have been refused.

The second point decided by the High Court stands on a different footing. It appears that the partnership's firm had in 1903 entered into a contract with the Secretary of State for India to construct a bridge which was completed in due course, but a dispute arose between the firm and the Secretary of State as to the amount payable to the firm under the contract. The surviving partners, or one of them, agreed with the Secretary of State that this dispute should be referred to the arbitrament of Mr. Sanders. The legal personal representatives of the deceased partner were not parties to the reference. The arbitration resulted in the award of a certain sum as payable to the firm, and this sum has been paid and brought into the partnership accounts. On the appeal the legal personal representatives of the deceased partner put forward for the first time a contention that they were not bound by the agreement of reference or the award. The High Court upheld this contention. In Their Lordships' opinion the High Court ought to have rejected the contention as having been put forward at too late a stage in the proceedings. The question whether the legal personal representatives were bound by the agreement and award was not a simple question of law, to be decided without reference to the facts of the case, or any evidence which might have been available. The original contract with the Secretary of State is not in evidence, and it is possible that it contained a submission binding on the legal personal representatives of the deceased partner. Even if it did not, and the agreement to refer was not originally binding on such legal personal representatives, it may have become binding on them by their acquiescence therein, or their acceptance of benefits thereunder. The point not having been raised prior to the hearing of the appeal, there has been no opportunity of

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ascertaining the relevant facts. Further, assuming that the agreement to refer was not binding on the legal personal representatives, it could hardly follow that they were entitled to relief on the footing that it was binding, but had been negligibly and improperly entered into. And lastly if relief could be given on this footing, why should the measure of damages be the difference between the amount originally claimed against the Secretary of State and the amount payable under the award, and why should the onus of proving that it was any less sum be thrown on the persons accused of negligent and improper conduct ? In Their Lordships' opinion the decision of the High Court in these respects was erroneous.

Under the circumstances Their Lordships will humbly advise His Majesty to discharge the order appealed from, and remit the case to the High Court with directions that the Commissioner's Report and the order of the Subordinate Judge confirming the same be discharged, and the case sent back to the Subordinate Judge in order that the accounts may be taken on the basis of the order of 31st May 1906 as varied by the order of the 26th March 1907, and on the footing that every party is bound to account to the best of his ability and to give full discovery of all documents in his possession relating to the matters in dispute, the costs of the appeal to the High Court being made costs in the action, and the appellants being entitled to their costs of this appeal.

Solicitor for appellants :—*Edward Dalgado.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Miller and Mr. Justice Tyabji.

Sowcar Sahanada Govinda Doss, and others *Appellants** *(Defendants)*

v.

Rajah Venkata Perumal Rajah, minor by his next friend Mr. W. A. Varadachariar *Respondent.* *(3rd Plaintiff).*

Govinda Doss v. Rajah Venkata Perumal.

Limitation Act, art 142, 144—*Property under lease—Mortgage by trustee for his own purposes—Court sale and delivery—No evidence of collection of rent—Burden of proving non-collection by defendant—Dedication—Evidence of.*

Where in execution of a decree upon a mortgage in favour of the defendant executed by the previous trustee for his own purposes without disclosing that he

* A. M. 76 of 1911. 23rd January 1914.

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was a trustee of the property which was at the time under lease in favour of a third party was sold and purchased by the defendant who was also put in formal possession and there was no evidence that at any time thereafter, rent was collected by the temple.

Held, that art. 142 applied to the case and more than 12 years having elapsed from the date of delivery to the defendant, the suit by the succeeding trustee to recover the property was barred.

There having been court delivery the burden was on the plaintiff to show that the defendant did not collect rent and was not in possession.

In the absence of any written grant or evidence of exclusive appropriation of the profits for the purposes of the temple, the mere fact that the income of the village had been used for the temple for a long time, that in the accounts the village was called jari or Tanaka to the temple and even the circumstance that the village was listed as a temple Village and was administered by the Devastanam department, (the Raja being the hereditary trustee of the temple) was held insufficient to make out a dedication of the village to the temple.

Per Tyabji, J.—The fact that people were willing to enter into dealings with reference to the property on the footing that it was Raja's private property was a circumstance that could be relied on to show that there was no dedication.

Appeal from the decree of the Court of the Temporary Subordinate Judge of North Arcot in O. S. No. 2 of 1910 (O. S. No 1 of 1907 on the file of the District Court of North Arcot).

K. Srinivasa Aiyangar and S. Ramaswami Aiyar for Apellants.

L. A. Govinda Raghava Aiyar for Respondent.

The Court delivered the following

Judgments:—*Miller, J*:—The suit was instituted in 1903 by the Rajah of Karvetnagar through a next friend, an officer of the Court of Wards to recover possession, on behalf of the temple of Sri Venugopalasami in Karvetnagar, of the village of Konasamudram which according to the plaint, was given to the temple on the 29th of August 1808 by a sanad of that date. The present Rajah has after the institution of the suit taken over the zamindari from the Court of Wards and continues the suit himself. In 1881 a lease of the village for a term of 10 years terminating on the last day of June 1891, was given by the then Rajah to two persons whom we may call the lessees, at a rental of Rs. 4000 a year which was to be credited in payment of sums due to them on mortgages executed by the Rajah. The Rajah is admittedly hereditary Dharmakartha of the temple of Sri Venugopalasami, but the money borrowed on the mortgages was not for the purposes of the temple but for his own private use.

2. In 1885 Konasamudram and another village were mortgaged by a simple mortgage to the father of the defendants,—I may call him the purchaser—and in 1887 he sued on the mortgage and obtained an *ex parte* decree on the 1st of April of that year.

3. The property was attached in execution of the decree, and was brought to sale in August 1889 and purchased by the mortgagee; the judgment-debtor attempted to get the sale set aside alleging *inter alia* that the property sold, the Konasamudram village, was "Tanakha" of the Sri Venugopalasami Temple and some other temples. The District Judge in March 1890 dismissed the application, and the High Court dismissed the appeal from his order, observing as regards the allegation that the property was temple property, that that point ought to have been raised in the suit. The judgment of the High Court was on the 16th April 1891, but the sale was confirmed in April 1890 after the District Judge's order, and possession was delivered by proclamation on the 7th of May 1890 to the purchaser who as I have said was the mortgagee himself.

4. In 1891 the Rajah's mother sued the purchaser to recover the village from him on behalf of the temple, but her suit O.S. No. 9 of 1891 was dismissed by the District Judge who held that on the facts stated in the plaint she had no cause of action. From this decision no appeal was preferred, and the purchaser and after him his sons remained in possession of the village until this suit was filed on the 30th of June 1903.

5. The Subordinate Judge has decreed the Plaintiff's claim holding that the village was granted to the temple and is in possession of the Rajah in his capacity of hereditary Dharmakartha, and consequently that its alienation was unlawful and the Rajah as Dharmakarta can recover possession of it.

6. He also dealt with several pleas in bar of the claim, deciding them all against the defendant. Of these pleas the only ones argued before us are those which raise questions of Limitation *Res Judicata* and *bona fide* purchase with notice.

7. I will deal first with the plea of Limitation. For the appellants it is claimed that Article 142 of the first Schedule of the Limitation Act applies and that the plaintiff is bound to show that he was not dispossessed twelve years before the institution

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of the suit, while the respondent contends that the defendants must show adverse possession for 12 years if they want to bar the suit. In the Court below some other provisions of the Limitation Act were relied on, but before us no argument was based on them.

8. As the evidence stands it is not very important to decide which of the two Articles 142 or 144 is applicable to the case, but I am unable to see any reason why Article 142 should not be applied if it is necessary to apply it.

9. For the appellant it was contended as in the Lower Court that the Dharmakarta lost possession at the date of the lease, *i.e*, in 1881; the lease was given by the Rajah not as Dharmakarta but as Zemindar, and the lessees did not therefore hold under the Dharmakarta but adversely to him. The Subordinate Judge has rejected this contention and, I think, has rightly rejected it. As Dharmakarta the Rajah could lawfully grant a lease for a term of years, and though he did not grant the lease as Dharmakarta and put the proceeds into his own pocket and not into the temple chest, that makes no difference; the grant of the lease was lawful and the possession of the lessees was lawful: their right to possession may be referred to the right of the Dharmakarta to give them possession and his misappropriation of the rent does not affect their possession.

10. The real question is, it seems to me, a question of fact. Possession was transferred, by proclamation after the Court sale, and from the date of the proclamation the purchaser, it is contended, obtained possession of the reversion, the term of the lease being then unexpired. The proclamation of possession was made, it will be remembered, on the 7th of May 1890, and the term continued until the 30th of June 1891. The suit was instituted on the 30th of June 1903. It is not denied by Mr. Srinivasa Iyengar that, although possession of the reversion was transferred on the 7th of May 1890 to the purchaser, still if the Rajah continues to receive the rent from the lessees he must be held to have retaken possession, in spite of the Court, and if he continued to receive all the rent due up to the end of the term he must be said to have been in possession on the 30th of June 1891 and therefore within twelve years of the suit. Mr Govindaraghava Iyer contended that though the proclamation of the 7th of May 1890 transferred the possession of the Rajah to the

purchaser, it did not transfer that of the Dharmakarta. As Dharmakarta the Râjah continued in possession. The fallacy in the argument seems to lie in the claim that a man can be in and out or partly in and partly out of possession at the same time: though turned out by the Court as Rajah, the plaintiff may no doubt still have had a right to remain in possession as Dharmakarta, but the right to possession is not possession.

11. Mr. Govindaraghava Iyer also contended that inasmuch as the lessee could not by any act of his own make his possession adverse to his lessor the payment of rent if any to the purchaser cannot make any difference. This is really irrelevant because the lessee's possession is not in question: the question is whether the possession of the Rajah ceased before the expiry of the term : the court certainly took it from him by its proclamation and unless he reacquired it by receipt of rent, he has lost it.

12. The lessees had undertaken to pay to the temple a sum of Rs. 1,500 annually out of the rent of Rs. 4,000, for the last four years of the term, and the accounts now produced by the Rajah from his Devastanam office are intended to prove that rents were received up to July 1891.

13. The last payment admitted by the defendants is that found in Exhibit X 2 as made on the 16th July 1890. Exhibit X 2 is an account of the payments made to the temple by the lessees from 1887 to September 1890 and is dated the 28th September 1890. The entry in question is under a heading for the year "Vikruti" and it is accepted by both sides that the year in the zemindari accounts run from July to June and not as ordinarily from the beginning of Chittrai month. Now the payment on 16th July cannot be on account of rent for the last year of the term: the 1st instalment of the rent for that year did not fall due till Kartigai of Vikruti under exhibit I, *i. e.*, about November 1890. The payment must therefore have been for an arrear due before or about the time of the delivery of the possession in May, the last instalment of the annual rent being payable in Vaigasi which will not be much later than the 7th of May. The heading for the year Vikruti probably therefore mean " payments made in the year Vikruti " as beginning about July. Exhibit X 2 does not therefore help the plaintiff on this question.

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14. On the other hand it shows that up to the 28th of September 1890 the lessees had paid only Rs. 4,000 out of Rs. 4,500 payable to the temple for the period ending with June 1890.

15. Exhibit Z is an account of payment made up to 12th February 1891, and contains two entries of payments of Rs. 250 each as made by the lessees of Konasamudram, the dates of payments are not given but the accounts include payments from Adi of Vikruti and therefore include the payment of 16th July 1890 with which I have already dealt. Taking this to be the payment described as having been made "on account of debt," the other payment is described as having been made for "Puvvasa of this year, *i. e.*, as explained to us, for the 1st instalment of the rent of the year Vikruti (1890-1891). Plaintiff's 4th witness who proves all these accounts does not himself explain this payment except as to the writing of the account, and the evidence of plaintiff's 6th witness is altogether too uncertain to be of any use. There is therefore nothing to show that the lessees actually paid this sum as part of the rent for Vikruti, except the fact which is of no great value, that it was so appropriated in the Zemindar's accounts. On the other hand in July 1890 including the payment of the 16th they had paid only Rs. 4,000 out of Rs. 4500 due till then, and the payment of Rs. 250 in October or November, if it was made then and not before (the date is not shown) may well have been made towards the arrears. Exhibit Z does not materially assist the plaintiff.

16. Then we have Exhibit Y 2 an office copy of an account never completed but which is to have been sent up to the Rajah's office from the Devastanam office: it contains an entry, dated 31st of Ani of Khara, *i. e.*, the 14th of July 1891 which runs "Rs. 100 pertaining to Konasamudram according to takid No. 101 got written by Varti Seshacharlu." The plaintiff's 4th witness does not explain the nature of the payment in his examination-in-chief, and in cross-examination he says the sum represented money which has been paid to the Devastanam Sheristadar on some date unknown to the witness and which was entered in the account as of the date of the order received from the Sheristadar. There is therefore nothing to show on what account this was paid, and nothing indeed to show that it was paid by the lessees at all so that even if Y 2 can be relied on as a

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regularly kept account, it does not further the plaintiff's cause.

17. I have dealt with all the evidence to which our attention was called on behalf of the plaintiff and it cannot be said to prove satisfactorily that anything was paid to the Rajah by the lessees for rent falling due after the date of transfer of possession. The defendants do not show that their father received rent before June 1891: they do not produce their father's accounts, but it is perhaps unfair to any inference against them from this fact, as the matter was over 12 years old at the date of the trial and so far as the lessees were concerned had been entirely closed. There was no debt due to the Sowcar which would require the preservation of the account relating to it, or its being brought up into the accounts of succeeding years.

18. There is evidence of defendant's 2nd witness who swears that the lessees were asked by him to pay the rent for the last year of their term to the Sowcar, *i. e.*, the purchaser, and that they agreed to settle with the Sowcar directly; he does not personally know if they actually paid anything. This evidence is supported by the *prima facie* probability that the sowcar having obtained possession would demand the rent, and that the lessees after the court's proclamation would not have paid the Rajah anything. They might have withheld the payment from both sides, but there is no evidence as to that; the Rajah's mother sued in March 1891 to recover the village for the temple, but before that time there is no apparent reason why the lessees should have refused payment to the purchaser. I think then there is sufficient evidence to show that the Rajah lost possession before the 30th of June 1891; and that is sufficient to bar the suit for possession.

19. It is not so clear that the purchaser received any rent before the end of June 1891 but he had the possession given him by the Court in 1890, and that will I think the possession adverse to the Rajah, it not being shown that rent falling due subsequent to that date was paid to the Rajah or anyone else. The fact if it be a fact that the lessees did not pay their rent until after the end of June 1891 will not make the purchaser's possession any the less adverse to the Rajah.

20. The suit is therefore in my opinion barred by limitation.

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21. It is however desirable in view of the probability that the case may be taken to a higher Court that we should decide also the principal issues in the suit, that it is to say, those dealing with the question whether the village was granted to the temple and so became trust property in the Rajah's hands and the mortgage and sale were therefore inoperative as against the trust.

22. The plaint alleges that the grant of the village was made by a sannad, dated the 16th Avani of Vibhava, corresponding to the 29th of August 1808. No sannad of this or any other date has been produced in this suit; in a suit instituted by the mother of the then Rajah in 1891 a list of documents was put in (Exhibit LL in the present suit) which contained the following entry.

Date and Year.	Particular of the record.	Remarks.
16th Avani of Vibhava.	Sannad written by Rajah Venkataperumal Rajah Bahadur Varu to Garnapudi Venkayya, Parpatyadar of Attimanjeri Payakat, that his share in the village of Konasamudram should be utilised for the daily allowance and lights of Sri Venugopalasami Varu.	Those records are herewith filed.

This may probably represent the copy of a letter which the Subordinate Judge has rejected as inadmissible in evidence and which we were not asked to admit, but assuming that its contents have been correctly abstracted in Exhibit LL and that we are entitled to take them from that abstract, it would seem that all was filed in the former suit was a letter (probably only an office copy) from the Rajah to one of his officers appropriating part of the revenue of Konasamudram village to the use of the temple. That may or may not have been in pursuance of a grant to the temple, but it is not in itself a grant, for the person to whom it is written was not described as a Dharmakarta of the temple; indeed the abstract rather suggests that there had been no grant. The Subordinate Judge has arrived at the conclusion that there was no grant in writing and I think he is very probably right. It has therefore to be seen whether in the absence of a sannad the plaintiff has adduced sufficient evidence to prove a grant *aliunde.*

23. The defendants relied on Exhibit VIII as showing that the village was not granted but this document purports to have

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been written in the year Nala and the evidence of Defendant's 1st witness shows that it is probable that that year is 1796 and not the more recent Nala of sixty years later ; and as the alleged grant was after 1796 Exhibit VIII does not really affect the matter.

24. The earliest document of value is Exhibit C C, and upon this both sides place reliance. It does not suggest that there was a grant in writing of the village to the devastanam. It is of the year 1814, and is headed an extract from the register Brahmadayam of Inam, etc., villages which are utilized for Devadayam (*i.e.*, temples), *i.e.*, rewards to Brahmans and Chattram and Rajah's relations, etc., in the Karvetnagar Samstanam.

The extract relates to the village of Punyam and Konasamudram which are utlilised for Sri Venugopalasami Devastanam in Karvetnagar; Punyam is said to have been "continued from before," and Konasamudram to have been 'Tanakha' in Prabhava year (1807-1809). There are four Schelat—(included or attached) temples which are named and the revenue and usual expenditure are set out with the remark that excess income is used for devastanam repairs. The Tanakha of Konasamudram income is made instead of rusums or sums collected from the ryots for temple purposes. That is to say according to this document the Rajah in 1807 instead of appropriating the rusums to the temple made a tanakha of the estimated revenue of the village of Konasamudram, and we may suppose pocketed the rusums, or ceased to collect them.

24. Now there is no evidence as to what is the accepted signification of the word Tanakha in the registers and accounts of the Karvetnagar Zemindari, if I except the statement of plaintiff's 7th witness that in the zemindari it generally means 'giving away'—a statement on which I do not think much reliance can be placed, and which Mr. Govindarghava Iyer did not ask us to accept as of great value. From Wilson's Glossary and other dictionaries which have been shown to us I gather that the word might be used to indicate a permanent assignment of the revenue of the village to a particular purpose, but that is not its necessary signification, and it may equally well connote a temporary order allotting or assigning in the non-technical meaning of that word, certain income to a certain purpose for convenience and

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for such as convenience may support the arrangement. It certainly does not necessarily import a permanent grant.

25. Here we have the fact that the Rajah was himself the hereditary Dharmakarta of the Venugopalasawmi temple and the Shamlat institutions, and there seems nothing unreasonable or improbable in the view that he may have found it more convenient to allot the income of the village of Konasamudram to the temple than to make appropriation from the Rusum collections. Perhaps indeed the very fact that he was Dharmakarta as well as Zemindar renders it less probable, because less necessary, that he would make permanent grants out of the zemindari land. It was his business to keep the temples going but not necessarily to endow them for that purpose—and if the collection of rusums failed, it may be that he would not have been at all bound to supplement the income of the institution from his own revenues.

I am not prepared in these circumstances to infer from the use of the word Tanakha that there was a grant to the temple, I do not rely on the fact that neither Punyam nor Konasamudram —villages appear as Devadayam grants at the Inam Settlement instituted by the British Government. It may be neither of these villages was allotted to the temples before the Permanent Settlement. Exhibit C C. is not clear on this point and there is no other evidence.

[His Lordship then discusses the other evidence in the case, and proceeds as follows].

30. There is in this case a good deal more evidence in favour of the plaintiff than was found in *Kenwar Rey* v. *Ram Chundr Sen* [1]. We have the separate appropriation of rents and the description of the villages over a long period. But even so I doubt having regard to the ambiguity of the word Tanakha and Jari and to the Rajah's position in respect of the temples, whether we can properly be said to have here that very clear and strong evidence which their Lordships in that case held 'ought to exist', to enable the plaintiff to discharge the burden which lies upon him, the burden in the present case of proving that the melvaram of the village of Konasamudram was inalienably conferred upon the temple of Sri Vengopalasami Varu and the connected temples in Karvetnagar to sustain the worship in these institutions. Upon the whole though not without some

(1) I. L. R. 2 Cal 341;

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doubt I think the evidence insufficient to discharge the burden. In the absence of an express grant there is noting inconsistent with a temporary appropriation of the rents of the village an appropriation which it has been found convenient to allow to continue for a long period, until the money was wanted for other purposes. I would for this reason as well as upon the ground of limitation allow the appeal and dismiss the suit with costs in both Courts.

31. It is unnecessary in this view of the case to decide the other two questions argued. The argument on the plea of *res judicata* was confined to the effect of the decision of the District Judge in the Suit No. 9 of 1891 instituted on behalf of the temple by the Raja's mother to recover the same village. The District Judge held that on the facts stated in the plaint the District Judge speaks of the allegations on the pleadings but the earlier part of paragraph 16 of his Judgment shows that he is referring only to the plaint, the plaintiff had no cause of action the temple it appeared to him was in the plaint alleged to be a private institution and the funds provided for its upkeep were at the disposal of the Rajah. It is as I have said unnecessary to decide whether in these circumstances the present suit by the plaintiff is barred or not.

32. The other question is whether the defendant's father as a *bona fide* purchaser for value without notice of the trust is entitled to retain the village in spite of the trust. The finding that there is no trust renders it unnecessary to decide this question either.

Tyabji, J :—I agree in the judgment prepared by my learned colleague which I have had the benefit of reading. The facts leading up to this appeal are set out in that judgment and I need not repeat them.

The first question with which I propose to deal is whether the village of Konasamudram appertains to the Sri Venugopalasami temple as alleged by the plaintiff. It is alleged that there was a sannad by which the said village was dedicated to the said temple (no such sannad is produced). The question as to whether there was a sannad and the bearing of Exhibit LL on the question has been dealt with by my learned colleague in

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detail and I have nothing to add to what he has said on those points. It has therefore to be decided whether the evidence to which I am going to refer in detail establishes that the village was as a matter of fact dedicated to the temple. I am of opinion that the evidence does not establish any such dedication. There is a great mass of evidence relating to the point, but it may all be grouped under comparatively small number of heads.

The earliest piece of evidence on which reliance is placed for this purpose is Exhibit IX dated 10th June 1810. That consists of a "Manyabhogavâta" (which has been translated as "information about the inam",) "enjoyed by Velamboori Ramabhotlu in Konasamudram village." With this Exhibit IX must be considered,—in which the village is spoken of as "of Karvetnagaram Estate." Each side relied upon the terms in which the village is referred to in these documents, but they do not appear to afford any very clear indication one way or the other.

The document which come next in point of time, and on which much reliance was placed, is Exhibit C C. It purports to be an "extract from the register showing the inam, etc., villages which have been granted (literally conducted for) for the Devadayam, Brahmadayam and Chatram and royal relations, etc., in the Karvetnagar Samastanam." The village of Konasamudram is included amongst the villages so "granted."

Exhibit C C is in tabular form. A good deal of argument was addressed to us as to the effect of the various items in it; and I shall deal seriatim with the portions of the Exhibits which were commented upon.

(1) The word which is translated as meaning "granted" in the heading to the exhibit, represents the original Marathi word *Chalvene* which literally means "continued for" or continually applied for."

(2) Secondly, it was pointed out that the Brahmins and royal relations are also referred to as being the beneficiaries.

(3) In the 7th column the word "Rusum" occurs, meaning "customary payments" and it was argued that this implied that the payments were voluntarily made.

A great deal of argument was addressed to us on etymological meanings of various words like "Rusum", "Tanakha", "Jari" occurring in the documents forming the evidence in this case. It seems to me that very little help can be obtained from a consideration of the literal or correct meaning that these words have in some cases, it may even be misleading to rely on the etymology of the words, as they have been corrupted beyond recognition and the significance attached to them popularly by those who use them without any knowledge of their original significance is almost independent of the sense in which the words would be used by scholars familiar with the languages from which the words are originally derived. In spite of this feeling in my mind, however, it is not possible altogether, to ignore the arguments that were addressed to us on the exact meanings of these words.

(4) In the 8th and 9th columns the words Tanakha occurs. The word was the subject of much comment. It seems that it is a corruption of the Arabic word *Tanakhwah*, the original meaning of which as given in Johnson's Arabic Dictionary is "an assignment of lands or an order of the Treasury for the payment of a stipend, salary, and the like." But the word seems to be used in very different senses as will appear from Wilson's "Glossary of Revenue terms" and it seems to me that the fact that the word occurs in Exhibit C. C does not show that the village of Konasamudram was absolutely granted away for the purposes of the temple. It may indicate that at the time when Exhibit C. C was written the village was in some way associated with the temple. There is nothing to indicate what the nature of the connection was. The words '*Tanakha*' and "Rusum", (if my argument is to be based on the fact that they occur in the documents), indicate, it seems to me, that there was a temporary arrangement by which the owner of the village for the time being applied the income of the village for the temple. The owner of the village was the Zemindar, who as the hereditary Dharmakarta of the temple and from his similar position also would be expected to support the temple. These documents do not indicate (though they are consistent with) an absence of the Zemindar's private ownership in the villages.

(5) The tenth column is headed "Shamilat Devastanam", and the name of four other temples are mentioned as sharing

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in the benefit derived from the villages mentioned in Exhibit C C.

(6) In the 11th column, it is stated that there is no sanad. The effect of Exhibit C C, seems to me to be far from being definite. On the whole I think it does not show anything further than this, that the Zemindar of Karvetnagar had given orders that the incomes of certain villages including the village of Konasamudram should for the time being be applied for the benefit of

(*a*) certain temples including not only the temple in question, but four other temples,

(*b*) of Brahmans,

(*c*) of Chatrams which I find translated in Brown's Telugu-English Dictionary as follows "a choultry as rest house for travellers an inn or hotel," and

(*d*) for "royal relations, etc.,"

Exhibit C C therefore seems to me to indicate that for the time being the Zemindar of Karvetnagar had ordered that the necessary religious and charitable expenses which would naturally be expected to be incurred by the Zemindar, should be defrayed from the income of the villages which are mentioned in Exhibit C C. The fact that in the 11th column no sanad is mentioned seems to me to be important.

Then the next set of documents which may be grouped together consists of entries from the account, memoranda etc. such as Exhibits E, E 1, E 2, F, F 1, H etc. From which it appears that portions of the income derived from Konasamudram village were remitted to the "Huzoor Devastanam Cutcherry", that is, to the office in charge of the temples (See Exhibit H). These accounts and memoranda do not, establish that the village of Konasamudram was totally and absolutely dedicated to the Venugopalasami temple. All they establish is that occasionally the profits derived from the village were sent to an office in charge of the temples and perhaps of other charitable institutions or objects. Thus from Exhibits F, Fl etc., it appears that out of the "collections" of Konasamudram certain sums were sent to the Devastanam office. It also appears from these accounts *e. g.* Exhibit G, and Exhibit H that the income of Konasamudram was not applied exclusively for the purpose of the Venugopalasami temple but for other temples and perhaps also of other

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charities. In Ex. H there is an entry showing the expenditure of Rs. 662 for *paditharam and* Rs. 603 for *ayan paditharam.* Frequently where the Venugopalasami temple is named in the heading to the account or memorandum, the word "Vagaira" (meaning "etcetera" or "and others") follows the name of that temple.

In these accounts and memoranda the expression "jari village" is occasionally applied to Konasamudram and other villages. The word "*jari*" is Arabic, and its usual significance in Hindustani and other languages allied to Arabic is "continuous". As I have already said I do not think that much help can be had by a consideration of the original significance of that word. The accounts seem to me far from having the effect of establishing that the village of Konasamudram was dedicated to the Venugopalaswami temple, because there is nothing to show what the total income of Konasamudram was. Nor is there anything to establish that the whole of the income of Konasamudram was devoted to the purposes of the Venugopalasami temple. There is no attempt at showing what the total income of Konasamudram was and how it was disposed of. The accounts are in the possession of the plaintiff; and the fact that the defendant is able to show even from the items adduced in evidence by the plaintiff that portions of the income of Konasamudram were devoted to objects other than the Venugopalaswami temple seem therefore to me to be important. The learned pleader who appears for the respondent in the course of his argument had to concede that "there is no evidence to show that every year the village contributed to the expenses of the temple." If there were years during which the village did not so contribute then it is clear that the argument based on a uniform and long continued practice must fail.

[His Lordship after discussing the further evidence in the case proceeds as follows.]

After considering the whole of the evidence adduced in this suit with reference to the dedication of the village I have come to the conclusion that the village of Konasamudram was not dedicated to the Venugopalasami temple and that therefore the sale to the defendants' predecessors in title was a valid sale.

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The next point with which I shall deal is whether the suit is barred by limitation. I agree that the suit is barred. The defendants' father purchased the village on the 8th August 1889 at a court auction held in execution of his mortgage decree and possession was transferred to him in May 1890. Exhibit VI is the sale certificate dated 24th April 1890, and Exhibit VI (a) is the receipt for possession dated 7th May 1890. At the date of Exhibit VI (a) the village was in the actual possession of ijaradars to whom the property had been leased by the Zemindar. It is contended for the plaintiffs that the purchaser did not obtain possession of the village in May 1890, nor until the lease had expired. As against this, we have the fact that under the decree of the Court the auction purchaser was purported to be put into such possession as could be given to him in May 1890; and strong evidence would be required to show that in spite of the execution proceedings the defendant did not obtain as full and complete a possession as was possible under the circumstances. The plaintiff contends that as a matter of fact after the date of Exhibit VI a rent was paid by the ijaradars to the zemindar as trustee of the temple and not to the defendants or their predecessor in title; and for this contention reliance is mainly placed on Exhibit X2 which is a memorandum of account. The heading of Exhibit X2 is as follows: "list showing details of amounts received from 1887 to September 1890, on account of Devastanam dues paid by Konduru Venkatraju and others lessees of Konasamudram". The item in Exhibit H2 relied upon by the plaintiff is for Rs. 250 bearing date the 16th July 1890. Exhibit X2 is referred to in the evidence of the fourth witness for the plaintiff and Exhibits X and XI show how it came into being. It seems to me that the item in Exhibit X2 for Rs. 250 is not a genuine one. It is unexplained why this item should be credited to the Vikruti year, 1890 of the Christian era, when as a matter of fact the rent for the previous year 1889 was not fully discharged. That it was not fully discharged is shown by the fact that a total of only Rs. 4000 is shown as having been received at the foot of the account. The rent being at the rate of Rs. 1,500 per year, the total amount due for the three years 1817, 1888 and 1889 would be Rs. 4500. This fact connected with the facts to which I have alluded before makes it extremely

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improbable that the sum of Rs. 250 should have been paid and accepted as rent for the Vikruti year, 1890.

Similar remarks apply to the entry for Rs. 100 in Exhibit Y2 which entry, however, does not refer to the period in respect of which the sum was received. Exhibit Z might show that as a matter of fact some portion of the rent was recovered after the transfer of possession to the defendants' father but that might well refer to the rent due for the period anterior to the purchase by the defendant's father.

It was argued that in spite of these facts the village must be presumed to be in possession of the trustee so long as the ijara continued. But it seems to me that there is nothing to prevent possession of the lands being transferred by the tenants being made to attorn to the transferee, and if as a matter of fact the rent is recovered by the transferee, he has obtained complete possession of the lands. In this connection it should be mentioned that there is no evidence that the rent of Konasamudram was collected immediately after the date of Exhibit VI (a) by the auction purchaser, the present defendant's father. The absence of such evidence was explained by the fact that the person who actually purchased the village in the sanction sale and through whom the present defendant claims it has died and it is difficult to trace the accounts at this time so long after the events. This explanation seems to me to be not unreasonable, and in any exent it must be for the plaintiff to prove in spite of the auction sale and of the formal delivery of possession to him by Exhibit VI A the rent was collected by the plaintiff and not by the auction purchaser. It is admitted that at the present moment the sons of the auction-purchaser are in possession. Their possession can be most reasonably traced to the auction purchaser: no circumstances are proved from which their possession can be referred except to the auction purchaser: and if their possession is to be referred to the auction purchaser it must *prima facie* be referred also to Exhibit VI A.

I am therefore of opinion that the defendant was in possession of the village adversely to the temple from May 1890. There was some dispute as to the Article of the Limitation Act that must apply. On behalf of the appellant articles 134, 142 and 144

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were suggested as the articles that must apply: the respondent's pleader suggested article 144. In any case if the defendants or their predecessors in title have been holding the land adversely to the temple since May 1890, the present suit was barred by limitation.

The other points were argued before us on behalf of the appellant, namely, that the appellant was a *bona fide* purchaser for value without notice of any trust, and secondly that the suit was barred by the doctrine of *res judicata*. It is unnecessary to deal with these points in view of the opinion that I have formed as regards the two questions with which I have dealt.

I agree therefore, that the appeal should be allowed and the suit dismissed with costs throughout.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Miller and Mr. Justice Tyabji.

C. Ganapathi Mudaliar ... *Appellant** (*Plaintiff*)

v.

Krishnamachariar and others ... *Respondents* (*Defendants*)

Ganapathi Mudaliar *v.* Krishnamachariar.

Trusts Act, S. 90—Mortgage—Mortgagee suing upon only one mortgage—Sale subject to earlier mortgages—Purchase by mortgagee—Transfer of Property Act, Ss. 67, 99—Not contravened—Ex parte decree against minors—No defence—Sale need not be set aside—Legal action of the mortgagee—Inadequate price as a result of—No remedy to judgment-debtors.

Where a person holding two mortgages sued upon only one of them the later but the sale proclamation mentioned his earlier mortgage as well as another mortgage of which he had taken an assignment after suit and stated that the sale was to be subject to those mortgages and he himself purchased the property.

Held, that these facts were not sufficient to bring the case within S. 90 of the Trusts Act.

Held further that the procedure adopted did not contravene the provisions of either S. 67 or 99 of the Transfer of Property Act.

Per Miller, J. An *ex parte* decree against minor defendants is binding against them unless negligence is brought home to the guardian. A sale held in execution of such a decree need not be set aside when it is not shown that the minors had any defence to put forward.

Where a decree was in the first instance made against the father and the minor sons but so far as the minor sons were concerned that decree was set aside and after the appointment of a fresh guardian, a decree in the same terms was again passed.

Held, that a sale on proceedings in execution commenced before the passing of the second decree (the sale proclamation and the sale taking place later) is not liable to be set aside on that ground when the guardian was aware of the proceedings and his objections were overruled.

Per Tyabji, J. Where the action of the mortgagee is perfectly legal, the mere fact that by reason of the action of the mortgagee the price fetched at the sale is inadequate is not a ground on which the sale could be set aside.

Appeal from the decree of the District Court of North Arcot in O S. No. 55 of 1907.

The facts are briefly these :—Suit is for redemption. There were three mortgages on the suit properties executed by the father of the plaintiff. The 1st was in favour of one Varadappa Chetti in 1876. The second was in 1879 in favour of the 1st defendant's father. The 3rd was in 1881 in favour of one Narasinga Rao. In 1886, the 1st defendant's father got a transfer

* A. No. 128 of 1910. 17th February, 1914.

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to himself of the third mortgage and sued on it the mortgagor and his two sons including the plaintiff without making any mention of the prior mortgagee of 1876 or 1879. (O. S. No. 5 of 1886). He obtained a decree for sale and brought all the properties to sale. But before the sale took place, the 1st defendant's father obtained a transfer of the mortgagor of 1876 and in the proclamation of sale, the sale was notified to be subject to the two prior mortgages in his own favour. He obtained leave *to bid* from the court and bought the property himself. In O. S. No. 5 of 1886, the minor sons of the defendant-mortgagor were first represented by their father as guardian and a decree passed. This was however, set aside by the court and a fresh decree to the same effect was passed with the maternal uncle of the minors as guardian. But in the execution applications, etc., the minors were described as before under the guardianship of their father, though the new guardian did in fact make some unsuccessful application on behalf of the minors to the High Court. The sale certificate was issued to the mortgagee auction purchaser and possession given of the properties in 1887. Defendants 2 to 5 are the sons of the 1st defendant, the son of the original mortgagee. Defendants 6 to 15 are stranger purchasers of portions of the property from the auction purchaser subsequently. The present suit O.S. No. 55 of 1907 was brought by the only surviving son of the mortgagor for redemption, more than three years after obtaining majority on the ground that the mortgage is subsisting and that the previous suit, decree and other proceedings are not binding on him. The District Judge dismissed the suit.

T. Rangachariar and *C. V. Ananthakrishna Aiyar* for Appellants.

S. Srinivasa Aiyangar for Respondents 1 to 5.

V. Ramdas for the 6th Respondent.

N. S. Narasimhachari for the 6th, 8th 10th to 13th and 15th Respondents.

T. Rangachariar for the appellants contended that the action of the mortgagee in suing upon one only of his mortgages, in O. S. No. 5 of 1886, was illegal and opposed to the provisions of the Transfer of Property Act. The purchase of the suit properties by the mortgagee himself, subject to his own

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mortgages is an infringement of the principle underlying S. 99 of the Transfer of Property Act. By such a purchase the mortgagee did not acquire an irredeemable title, but became a trustee for the mortgagor; and the property was therefore held in trust, for the mortgagor see S. 90 of Transfer of Property Act. The mortgagor and therefore his son, could redeem at any time within 60 years.

The plaintiff and his deceased brother were minors and were not properly represented in O. S. No. 5 of 1886 and the decree therefore is not binding on them. See *Pancham Lal Chowdhury* v. *Kishun Pershad Misser* [1] *Khairajmal* v. *Daim* [2] *Ashutosh Sikdar* v. *Behari Lal Kirtania* [3] *Bal Kishan Lal* v. *Topeswar Singh* [4]. The purchasers take only the rights of their vendors.

S. Srinivasa Iyengar, for Respondents 1 to 5 argued that the contention that the minors were not properly represented was unsound. The guardian, newly appointed did in fact act on behalf of the minors and apply for stay of execution etc., in the High Court, at the time. Except as guardian he had no *locus standi*. It is not shown that there was any available defence, which he failed to put forward. See *Walian* v. *Banke Behari Pershad Singh* [5], *Parameswari Pershad Narayan Singh* v. *Sheo Dutt Rai* [6], *Munshi Munnu Lal* v. *Ghulam Abbas* [7], *Vishnu Narayan* v. *Dattu Vasu Deo* [8], *Pokhpal* v. *Chhiddu Singh* [9], *Hanuman Prasad* v. *Muhammad Ishaq* [10].

The continuance of the execution proceedings upon an application put in before the revised decree, without the alteration of the dates of the decree, and the necessary mutation of the guardian's names is only an irregularity and the sale thereunder is good. See *Ghazi* v. *Kadir Baksh* [11].

There is no question of trust at all arising in this case, the mortgagee having obtained leave to bid. See *Mahabir Pershad Singh* v. *Macnaghten* [12]. *Sahadu Manaji Shinde* v. *Devlya Jaba Mahar* [13]. The suit as framed did not offend against any of the

1. (1910) 14 C. W. N. 579.
2. (1904) I. L. R. 32 C. 296 (P. C.)
3. (1907) I. L. R. 35 C. 10.
4. (1911) 15 C. L. J. 446.
5. (1903) I. L. R. 30 C. 1021 (P C.)
6. (1907). 6 C. L. J. 448.
7. (1910) 12 Bom. L. R. 439.
8. (1907) 9 Bom. L. R. 1099.
9. (1912) 9 A. L. J. 653.
10. (1905) I. L. R. 28 A. 137.
11. (1876) I. L. R. 1 A. 212 (F. B)
12. (1889) I. L. R. 16 C. 682.
13. (1911) 14 Bom. L. R. 254.

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provisions of the Transfer of Property Act. That section applies in the case of money decrees and not in the case of a mortgage decree directing the sale of the mortgaged properties. See *Abdul Rakmian* v. *Mahomed* [1] *Radhakrishna Iyer* v. *Muthusawmy Sholagan* [2] *Sesha Aiyar* v. *Krishna Ayyangar* [3]. Even assuming there were any irregularities in the old proceedings, the suit is barred by art 12. (a) of the Limitation Act. See *Thaleri Pathumma* v. *Thandora Mammad* [4] *Kuttan Nayar* v. *Krishnan Mussa* [5], *Malkarjun* v. *Narhari* [6] *Govindasami Pillai* v. *Ramasami Pillai* [7].

S. 90 of the Trusts Act has no application to the case of simple mortgages and further it is not shewn what advantage has been gained by the mortgagee in derogation of the rights of the mortgagor.

N. S. Narasimhachari, for respondents 6, 8, 10 to 13 and 15. contended that these respondents are all *bona fide* purchasers for value without notice. Whatever equities the plaintiff may have against the mortgagee purchaser and his sons, he has none against these respondents who are protected by S. 96 of the Trusts Act. See also *Sheik Ismal Rowther* v. *Rajab Rowther* [8] *Marimuthu Udayan* v. *Subbaraya Pillai* [9].

As far as the 6th defendant is concerned, more than 12 years having elapsed since the date of his purchase, the claim is clearly barred as against him under Art. 134 of the Limitation Act, even on the assumption that the mortgage is subsisting.

C. V. Ananthakrishna Aiyar replied.

The Court delivered the following

Judgments:—*Miller, J*:—Dealing first with the question whether the plaintiff was represented in the former suit O. S. No. 5 of 1886, and the execution proceedings which followed on the decree in that suit, I find no difficulty in accepting the District Judge's conclusion on that point.

The only evidence in the plaintiff's favour consists of two facts, first, in such of the documents relating to the execution proceedings as have been preserved, the date given as that of the

1. (1892) 2. M. L J. 188.
2. (1908) I. L. R. 31 M. 530.
3. (1900) I. L. R. 24 M. 96.
4. (1900) 10 M. L. J. 110.
5. (1902) 12 M. L. J. 390.
6. (1900) I. L. R. 25 B. 337 at 348.
7. (1908) I. L. R. 32 M. 72.
8. (1906) I. L. R. 30 M. 295
9. (1902) 13 M. L. J. 231.

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decree is that of the decree against the father of plaintiff and not that of the final decree against the plaintiff and his brother and his father; that it is suggested shows that the decree against plaintiff was never executed. But the two decrees were identical and the one was substituted for the other after the appointment of a new guardian for the plaintiff and his brother, and the failure of that guardian to put in a defence. The date is therefore probably a mere mistake. Secondly the name of the plaintiff's father in some of these documents appears as his guardian, and not that of his maternal uncle Govindaraju who is proved to have been duly appointed his guardian for the suit in supersession of his father. Obviously these irregularities may have been due to carelessness of the court officials, and the effect of this evidence is more than counteracted by the fact that Govindaraju did as a matter of fact act in the execution proceedings. He preferred an appeal to the High Court, the nature of which cannot at this date be ascertained, and he prosecuted unsuccessfully an application for stay of the sale pending the disposal of the appeal. It is not shown that his *locus standi* was questioned by any one at that time, and it is clear that he could have had no *locus standi* except as guardian of the present plaintiff. His own story is that all he did was done under the directions of the plaintiff's father and that may probably be true, for it is shown that the plaintiff's father himself declined to represent his sons in the suit. No proof was laid before us that the plaintiff's father was in collusion with the mortgagee; if he had been so he would probably have remained on the record as his son's guardian; it is more likely that he wanted to set up the familiar case that his sons were not bound by the debts contracted by him, and looked to Govindaraju to make good that case. He and Govindaraju were late for court as Govindaraju says and so the suit was decided *ex parte*, but it has been argued here that Govindaraju was negligent or corrupt. I find no reason to suppose that the plaintiff was not duly represented throughout the execution proceedings. As a matter of fact it has not been contended here that the plaintiff and his brother had any good defence to the suit. They were both born after the mortgages; they attempted before the District Judge to show that their father's debts did not bind them, but they failed there and have not renewed the attempt here. The other question is whether

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by reason of the provisions of S. 90 of the Trusts Act the mortgagee-defendants hold the equity of redemption for the benefit of the plaintiff, so that it is still open to him to redeem the mortgages.

It is urged that the sale was in contravention of the provisions of S. 99 of the Transfer of Property Act (since amended and incorporated in the Civil Procedure Code), and by this illegality the mortgagee who brought about the sale gained an advantage in derogation of the rights of the mortgagor and so became constructively a trustee for him. It is clear to me that S. 99 has no application. The sale was on a decree for sale, inartistically drawn, no doubt, but clearly a decree for sale, made in a suit for sale on a mortgage on the land sold, and there can so far as I can see be no objection to it under S. 99. Sufficient time was allowed for redemption before the sale and the fact that a date for payment was not fixed in the decree has not therefore prejudiced the mortgagor. Then it is said that the mortgagee failed to bring into his suit for sale two prior mortgages one in his own favour, and the other assigned to him before the sale, and having failed to bring them into the suit, he notified them as reserved in the proclamation of sale, and so deterred investors from competing with him for the acquisition of the equity of redemption. Thus he gained an advantage in derogation of the right of the mortgagor. Assuming that S. 90 of the Trusts Act is applicable to the case of a mortgagee who is not in possession, and taking it that the proclamation of sale is an act of the mortgagee as such, I do not think that the mortgagee in this case has been shown to have brought himself within the section.

The mortgagor has a right to a reasonable time for redemption: that he has had: he has no right to require that prior mortgages should not be disclosed in the proclamation of sale: if he had any objection on that ground either to the decree or to the sale he could have made his objection before the sale and not now, 25 years after it. So far as we know he did not then suggest that there was any illegality in the mortgagee's proceedings; if he did he failed to convince this Court that he had any grievance. Nor can it be said that there was any such illegality; however convenient it may be to require a mortgagee to bring in all his

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mortgages in his suit for sale on one of them, the weight of authority in this Presidency seems to be against the view that he can be compelled to do so. *Kizakini Akatti Rakmian Naha* v. *Kizakini Akuth Mahomed Naha* [1] *Radhakrishna Aiyar* v. *Muthusamy Sholagan* [2] and *Sesha Aiyar* v. *Kirshna Aiyangar* [3].

In these circumstances the plaintiff, it seems to me, must fail. He does not allege in his plaint that the mortgagee's proceedings, though legal, were contrived with a view to secure an advantage to himself, and there is no issue framed for the investigation of that question. Some evidence was given as to the value of the property, and the District Judge finds that the mortgagee bought it cheap, but neither side considered that a very material question before the District Judge.

To direct an issue now to this point so long after the sale would seem to be futile; moreover it would raise a question which properly should have been and possibly was raised by the plaintiff's guardian before the sale, or in an application to set aside the sale under S. 311 of the Code. I do not think that the plaintiff can ask for an enquiry now and he did not in fact ask for it. I would dismiss the appeal with costs.

If it was necessary to decide the question, I should have no difficulty in accepting the conclusion of the District Judge that defendants Nos. 6 to 15 are *bona fide* transferees for consideration within the meaning of S. 96 of the Trusts Act, and so are not affected by the trust. There is really no evidence pointing the other way.

Tyabji, J:—The question involved in this appeal is whether the plaintiff is entitled to claim that he has the equity of redemption in certain lands notwithstanding that the defendant's father through whom the defendants claim the lands (and whom I shall include in the terms "defendants") purchased the lands in an auction sale in execution of a decree for sale; in other words, the question is whether the defendants are owners of the lands or merely mortgagees. The decree for sale is dated 15th April 1886. It is not in strict accordance with the form laid down in the Transfer of Property Act for decrees for sale to be passed at the instance of mortgagees, but for the purposes of the present appeal it is not disputed that it must be taken to have ordered

1. (1892) 2 M. L. J. 188. 2. (1908) I. L. R. 31 M. 530=18 M. L. J. 564.
3. (1900) I. L. R. 24 M. 96=12 M. L. J. 383.

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the sale of the mortgaged property for the purposes of satisfying the claims of the mortgagee. The plaintiff however claims that the purchase by the defendants in execution of that decree cannot avail against the plaintiff's right to redeem, mainly on three grounds.

1. The first of these grounds is that the plaintiff was a minor interested in the ancestral property forming the subject of the mortgage and yet he was either not at all, or not properly, represented in the suit on the mortgage, and consequently that the equity of redemption which was vested in the plaintiff was not sold in execution of the decree passed in such a suit. The suit on the mortgage is O. S. No. 5 of 1886 in the District Court of North Arcot. In that suit the plaintiff's father was the first defendant; the plaintiff was the second defendant and a brother of the plaintiff now deceased was the 3rd defendant. The first defendant there was described as the guardian of his minor sons 2nd and 3rd defendants. The acting District Judge in his judgment dated 15th April 1886 states what occurred before him in the following terms.

'The first defendant appeared and said he was not the guardian of his sons and admitted the claim in other respects. The first defendant is undoubtedly the guardian of his minor sons. He cannot discharge himself of that responsibility by his bare assertion'. The learned District Judge accordingly passed a decree against the first defendant personally and for sale of the property, leaving the 2nd and 3rd defendants parties to the decree, as represented by their father the 1st defendant. Subsequently the same learned Judge held on an application by one Govindaraju Mudali the maternal uncle of the 2nd and 3rd defendants in that suit that " the appointment of the 1st defendant as guardian was illegal and accordingly set aside the decree as against 2nd and 3rd defendants and appointed Govindaraju Mudaliar, guardian instead by order dated 10th November 1886. The case stood posted to 15th November 1886 and Govindaraju Mudali was ordered to put in his written statement on the date. On that date he did not appear. " Thereupon on 15th September 1886 a decree was again passed for the recovery of the sums due on the mortgage "from the 1st defendant pesonally and by sale of the mortgaged property." The two decrees thus passed on 15th April 1886 and 15th September 1886 in Suit No. 5 of 1886 were

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substantially in identical terms the only material difference being that in the latter judgment and decree the 2nd and 3rd defendants were represented by their maternal uncle Govindaraju as guardian and not by their father. The execution proceedings in the said suit were begun on 16th August 1886 a month prior to the amended decree. The first step in execution was by application No. 57 of 1886 for execution of the decree of 15th April 1886 as it then was. In pursuance of this application, on 21st January 1887 there was a proclamation for the sale of the property. On 29th February 1887 the mortgagee decree holder obtained leave to bid at the Court sale. In the meantime Govindaraju the newly appointed guardian of the minor sons of the mortgagor had applied to the High Court to stay the sale. The application was dismissed by Parker J. on 1st August 1887. The sale was consequently held on 19th September 1887 and the mortgagee the father of the present defendants having been the highest bidder he obtained a sale certificate on the 1st of February 1888. There were some other proceedings in the High Court, described in the final order of the High Court as an appeal against the order of the District Court of North Arcot dated 14th September 1887 passed on Miscellaneous Petition No. 57 of 1887 and execution Application No. 57 of 1887 (O. S. No. 5 of 1886) and the appeal was dismissed. It would appear however that Govindaraju the guardian of the minors was not a party to these proceedings nor were the minors otherwise represented in them.

Under these circumstances the question is whether the minors are bound by the sale of 19th September 1887, evidenced by the sale certificate of 1st February 1888. There is no doubt that though in the decree as ultimately passed the minors were represented by Govindaraju and not by their father; still in the execution proceedings the father was stated to be the guardian. Yet it is clear that Govindaraju knew of the execution proceedings, that he went up to the High Court for stay of the sale and was not able to satisfy that Court that there was any ground for staying the sale. It cannot be said therefore that the misdescription of the person representing the minors was more than an irregularity. It misled no one. It did not prevent the minor's interests being watched by the guardian.

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I am therefore of opinion that the execution must be taken to have been under the amended decree in which the minors were properly represented, and that they are bound by the sale notwithstanding that in the execution proceedings the guardian was misdescribed.

2. Next it was argued that the sale was invalid because it was not in accordance with the Transfer of Property Act, Ss. 99 and 67 of the Transfer of Property Act were relied upon. The argument was that S. 99 of the Transfer of Property Act provides in effect that the sale of a mortgaged property shall be made at the instance of the mortgagee only in pursuance of a mortgage suit in accordance with the provisions of the Act. Assuming that the principle underlying S. 99 may be stated broadly as above it seems to me that there is no provision of the Transfer of Property Act which was disregarded in the suit of 1886, so as to make the decree passed in the suit any the less effective against the parties to the suit.

The facts relevant to this contention are as follows:

There were three mortgages on the property which is the subject matter equally of the present suit and of Suit No. 5 of 1886. These mortgages were dated 12th December 1876, 7th January 1879 and 10th May 1881 respectively.

The holder of the second of these mortgages was the father of the present defendants.

He became the assignee of the 3rd and 1st mortgages on the 20th January 1886 and 2nd November 1886 respectively.

On 19th March 1886, *i.e.* after taking the first of these assignments the mortgagee instituted a Suit No. 5 of 1886, to which I have before referred. This suit was based on the 3rd mortgage alone and the plaintiff made no mention of the other mortgage which was in favour of the same mortgagee nor of the 1st mortgage which was in favour of a third party, but which also as I have stated was assigned to the plaintiff in the suit on 2nd November 1886, *i.e.*, about 8 months after the plaint was filed. In this suit the two decrees were successively passed to which I have referred in the earlier part of my judgment. The decree in neither form made any mention of any other mortgages on the property. But in execution proceedings and when the property was proclaimed for sale, the other mortgages were mentioned as prior encumbrances and the sale certificate declared

that the purchase at the sale by public auction was "subject to encumbrances."

It may be argued at the highest that the mortgagee by not having sued on his prior mortgages lost the right of suing on them at a later date. But how can that fact affect the suit on the later mortgages? If it did in any way affect the interests of the mortgagor (who was the only other person concerned), it is extraordinary that the point was not taken in his written statement. I am unable to hold that as a matter of law the decree obtained in O. S. No. 5 of 1886 is the less binding because the suit was based on only one out of several mortgages. It seems to me therefore that the decree for sale must be considered to bind the defendants.

3. The third ground on which it is contended that the plaintiff may redeem the properties is that the defendants were themselves the mortgagee-decree-holders, as well the purchasers in execution of the decree, and that their purchase of the mortgaged property under the circumstances to which I shall refer below, was an advantage gained by a mortgagee which must enure to the benefit of the mortgagors by virtue of S. 90 of the Trusts Act.

In order that the plaintiff may succeed in this contention it must be shown that the mortgagee (a) availed himself of his position as such (b) that by doing so gained an advantage (c) that such advantage was in derogation of the rights of other persons interested in the property.

The advantage that the mortgagee is alleged to have gained is that he had the property put up for sale subject to his own prior mortgages (which it is alleged he was not entitled to do) and that, on this being done the bids at the auction sale must have been less high than they would otherwise have been. It seems evident that the contention under S. 90 of the Trusts Act could not have been taken in this form in the lower Court. For one necessary ingredient in it is that the properties as a matter of fact brought a smaller price than they ought to have that the mention of the other mortgages in favour of the decree-holder deterred other would-be purchasers from bidding for the property. The fact that the properties were worth much more than they fetched in the auction sale is no doubt to be inferred from

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the finding by the learned Judge that the properties were really worth between Rs. 50,000 and Rs. 60,000 at the time of the sale, though they fetched only Rs. 8341 at the auction-sale. The learned Judge however does not draw the inference, but on the contrary states in express terms that "both sides pointed out that the question of price is not material in the case." But though the argument under S. 90 does not seem to have been taken in the same form in the lower court as before us, yet that section was evidently relied upon, and is referred to in the judgment of the lower court. Under these circumstances the mere omission to notice the importance of proving the actual price of the properties and deducing from it that some advantage was gained by the mortgagee, might not in itself have been a sufficient reason in a case of such difficulty as the present for preventing us from asking any further finding on the issues necessary for determining the applicability of S. 90. But there are other reasons why the course does not seem to me to be advisable. I shall indicate those reasons in considering the facts that are now before us and in applying them to S. 90 of the Trusts Act.

The first difficulty in the way of the appellant's contention is to show that in the suit of 1886 the mortgagee availed himself of his position as such. What the mortgagee did was to sue on one of his mortgages without mentioning his other mortgages. The mortgagor did not apply that the other mortgages should also be made subject of the suit in 1886, nor does it appear that the mortgagee did anything that he was enabled to do because he was the mortgagee and by which the other mortgages were prevented from being included in the suit. The plaintiff in that suit had at the time when the suit was instituted only one other mortgage on the property. He became the assignee of the third mortgage only after instituting the suit. Can it be said that the holder of the third mortgage also availed himself of his position as mortgagee by permitting the suit being brought on only one of the mortgages in derogation of the rights of the mortgagor? If the other mortgagee was not doing anything in derogation of the rights of the mortgagor can the plaintiff in the suit of 1886 be placed on a different footing.

I have already referred to the next point which must be considered in connection with S. 90 of the Trusts Act whether

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the mortgagee has gained an advantage and whether as a matter of fact other bidders were deterred from bidding for the property.

The third point connected with S. 90 is assuming that some advantage was gained by the mortgagee was it in derogation of the rights of the mortgagor? It is difficult to say what rights of the mortgagor were violated. I have already given reasons for coming to the conclusion that the suit was not instituted by the mortgagee in 1886 and that the decree was not passed in contravention of any law. Were any rights of the mortgagor violated by the mortgagee being permitted to bid at the auction sale? The mortgagee was entitled to ask for permission to bid, and there is nothing to show that in getting the permission he was guitly of any fraud or otherwise violated the rights of the mortgagor. The fact that there were other mortgages outstanding and that they were both in favour of the decree-holder, ought to have been a consideration to be borne in mind by the Court in permitting the mortgagee-decree-holder to bid at the auction sale in execution of the decree. But it would be wrong after the lapse of so many years and in the absence of clear evidence to proceed on the basis that this matter was not placed before the Court and due weight was not given to it, this is the more so as the sale was sought to be stayed by an order of the High Court and the High Court saw no reason to stop it. Then can it be said that the rights of the mortgagor were violated by the properties having been put up for sale subject to the prior encumbrances? It is true that in the events that happened, the mortgagee having himself purchased the properties the saving of those encumbrances could have no effect or meaning for the holder of the encumbrances having become the owner of the property he could not have a mortgage on his own property. But when the mortgagee was permitted to bid, it did not mean that no other person was to bid. Had any other person been the purchaser at the auction sale, he would I presume have had to purchase the property subject to the prior encumbrances and then it could not have been said that the saving of the rights under the prior encumbrances, was unmeaning. So that the proclamation of sale subject to prior encumbrances cannot be said to be in violation of the rights of the mortgagor, and if so, then the

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purchase in pursuance of that proclamation by a person who had obtained leave to bid was not in such violation.

I come therefore to the conclusion that S. 90 of the Trusts Act cannot avail the appellants, because assuming that the mortgagee gained some advantage at the expense of the mortgagor, I am unable to say in the circumstances of this case that the advantage was gained by the mortgagee having availed himself of his position as such or that the advantage was gained in derogation of the rights of the mortgagor. I do not come to this conclusion without some hesitation as there seem to be indications that the mortgagee took full advantage both of his own position and of what seems to be incomprehensible torpor and incompetence of the mortgagor. It is difficult to understand why the mortgagor did not take any of the steps that were available to him for safe guarding his interest why he did not apply that the other mortgages be included in the suit, why he did not ask for the mortgagee to be put on terms before being permitted to bid at the auction sale as for instance, that if the mortagee-decree-holder wished to bid at the auction sale then the sale should not be subject to the previous encumbrances in favour of the decree-holder himself. It may be that the mortgagee acted upon a scheme for bringing the mortgaged property to sale under such conditions as to permit of his buying it up at a very low price. But if there was such a scheme it seems to have been so planned as not to contravene any provision of the law. On the other hand it is possible that there were satisfactory explanations for all these matters, and that the mortgagee acted not only within his strict rights, but that he did not do anything which the Court would have disapproved or desired to prevent. The events are too distant and the mortgagor was too careless of his own interests to allow the plaintiffs now to seek the assistance of the Court.

I agree that the defendants 6 to 15 are *bona fide* transferees for consideration.

For these reasons I agree that the appeal should be dismissed with costs.

Miller, J. and Tyabji, J.:—There will be one set of costs against the appellants: but so that out of the costs that are allowed the transferees (respondents 6, 8, 10 to 13 and 15) will get their full costs; and the balance will be received by respondents 1 to 5.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Ayling and Mr. Justice Seshagiri Aiyar.

M. Vijiaraghava Pillai ... *Petitioner.* * *(Counter-petitioner in both cases)*

v.

P. Theagaraya Chetti ... *Counter-petitioner. Petitioner (in Crl. R. C. No. 69 of 1914)*

v.

P. M. Appasami Pillai ... *Counter Petitioner. (in Cr. R. C. No. 70 of 1914.) Petitioner*

Vijiaraghava Pillai *in re*

Charter Act, S. 15—Cr. P. C. S. 439.—Power of superintendence—Madras City Municipalities Act (Act III of 1904) S. 413—Rules framed by Local Government—Rule 5—Order by Presidency Magistrate, declaring inclusion as candidate illegal—No power to revise.

The High Court has no power to revise an order passed by the Presidency Magistrate under Rule 5 of the rules framed by the Local Government in pursuance of the powers given to them by S. 41 of Act III of 1904 declaring the inclusion of any person as a candidate for municipal election illegal.

Petitions under S. 15 of the Charter Act and S. 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the fourth Presidency Magistrate, George Town, Madras, in applications Nos. 155 and 156 of 1914.

T. Ethiraja Mudaliar and S. Srinivasa Iyengar for Petitioner.

The Crown Prosecutor (*J. C. Adam*) on behalf of Government.

The Court made the following

Order.—These are petitions to revise the order of the Presidency Magistrate, George Town. Two applications were made to him by the counter-petitioners to declare that the inclusion of the petitioner as a candidate for Municipal election by the President of the Corporation was illegal under rule 5 of the rules framed by the Government in pursuance of the powers given to them by S. 413 of Act III of 1904. The Magistrate allowed the applications. Against that order these petitions have been filed. The learned

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* Cr. R. C. Nos. 69 and 70 of 1914.

Cr. R. P. Nos. 60 and 61 of 1914. 28th July 1914.

Vijiaraghava Pillai *in re*

Judge who admitted the petitions expressed doubts regarding the powers of the High Court to revise the order of the Magistrate. We therefore called upon the petitioner's Vakil to argue that preliminary point. Mr. T. Ethiraja Mudaliar, who appeared for the petitioner, conceded that the petition did not lie under S. 439. He however contended that under the Charter Act, the High Court was competent to revise the order. S. 15 says that the High Court shall have superintendence over all courts which may be subject to its appellate jurisdiction. Is a Magistrate giving his decision under the rules framed by the Government in this behalf "a court" subject to the appellate jurisdiction of the High Court? No procedure is prescribed by the rules: and although the Magistrate is competent to take evidence in the case, it is not suggested that this is in pursuance of any statutory obligation to do so. The contention of the learned Vakil for the petitioner is that the Magistrate is ordinarily subject to the control of the High Court, and any power given to him by the Local Government must be considered to have been conferred on him in his capacity as being subject to the supervising power of the High Court. It seems to us that this contention is untenable. It was held in *Minakshi* v. *Subrahmanya*,[1] by the Judicial Committee, that the expression Civil Court in S. 10 of Act XX of 1863 does not import that the presiding officer is subject to the appellate authority of the High Court. They say "In the opinion of their Lordships the tenth section places the right of appointing a member of the committee in the Civil Court not as a matter of ordinary Civil jurisdiction, but because the officer who constitutes the Civil Court is sure to be one of weight and authority, and with the best means of knowing the movements of local opinion and feeling, and one can hardly imagine a case in which it would be more desirable that the discretion should be exercised by a person acquainted with the District and with all the surroundings. We are of opinion that similar considerations are responsible for the Local Government vesting in the Presidency Magistrate the discretion to pronounce an opinion on the competency or otherwise of a candidate for election. We may also, in this connection refer to Rule 11 of the Rules framed under the District Municipalities Act. The

1. (1887) I. L. R. 11 M. 26.

Vijiaraghava Pillai *in re.*

Local Government has empowered Collectors to exercise the function which the Presidency Magistrates in the Town of Madras exercise under the rule in question. It has never been suggested that a Collector's decision can be revised by the High Court. The learned Vakil for the petitioner has drawn our attention to the decision in *Vasudeva Aiyar* v. *The Devasthanam Committee of Negapatam* [1] which holds that the High Court has power to hear a revision petition under S. 115 of the Code of Civil Procedure against an order passed under S. 10 of Act XX of 1863. We are informed that that decision is under appeal to His Majesty in Council, and apart from this we do not think the decision has any direct bearing upon the matter we have to decide. Mr. Ethiraja Mudaliar cited *Swami Chetty* v. *Corporation of Madras* [2] to show that the Magistrate acting under S. 172 of the City Municipal Act is subject to the jurisdiction of the High Court. The reason of that decision, we take to be this. If the Magistrate had acted legally, he should have referred the matter to the High Court. By not doing so, he has illegally exercised jurisdiction to decide the matter himself and has prevented the High Court from exercising its jurisdiction in the matter. The learned Judge was therefore justified in that case in taking cognisance of the case in revision. The mere fact that Ss. 172 and 176 of the City Municipal Act put the Presidency Magistrate under the control of the High Court in certain cases is not an argument for the position that in framing rules under S. 413, the Local Government invested the Magistrate with powers to be exercised subject to the superintendence of the High Court. The learned Crown Prosecutor argues that unless an officer is clothed with powers to give effect to his decision, he is not acting judicially. The reference to the functions of the Court in 3 Blackstone pages 22 and 23 supports this contention. Lord Justice Fry in *Royal Aquarium and Summer and Winter Garden Society* v. *Parkinson* [3] makes some observations which define the functions of a Court of Law. Applying the tests mentioned by the Lord Justice, the Magistrate acting under the rules could not be regarded as a Court of law. Reference may also be made to Vol. 9 Halsbury, page 9, where it is said, "Many bodies are not Courts, although they have to decide questions,

1. (1913) 25 M. L. J. 536
2. (1912) 23 M. L. J. 591.
3. (1893) 1 Q. B. 431 at page 447 and 448.

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and in so doing have to act judicially in the sense, that the proceedings must be conducted with fairness and impartiality." To the same effect is the conclusion to which Mr. Justice Subrahmanya Aiyar came in *Manavala Goundan* v. *Kumarappa Reddy* [1] regarding the competency of the High Court to revise the orders of the Distict Registrars under S. 622 of the old Code of Civil Procedure. We are therefore of opinion that the Presidency Magistrate in this particular instance is not a court subject to the appellate jurisdiction of the High Court. He is in the position of referee between the President and the candidate. The rule declares his decision to be final, as in the case of the Collector under the District Municipalities Act. The decision in *Balaji Sakharam* v. *Merwanji Naoroji* [2] may also be cited in this connection. It was held in that case that a District Judge acting under S. 23 of the Bombay District Municipal Act was not subject to the revisional jurisdiction of the High Court. In *Rudolf Stallmann* v. *Emperor* [3] the learned judges decided that the High Court had no jurisdiction under the Charter Act to revise the proceedings of the Presidency Magistrate acting under Ss. 3 & 4 of the Extradition Act (XV. of 1903). These authorities show that when quasi-judicial functions are delegated to an officer whose decisions are ordinarily subject to the revisional powers of the High Court he is not with reference to the delegated power necessarily subject to our appellate or revisional authority.

We have given our careful consideration to these cases and we are constrained to hold that the High Court has no power to revise the order passed by the Magistrate in these cases.

For all these reasons, we dismiss the petitions.

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1. (1907) I. L. R. 30. M. 326.
2. (1895 I. L. R. 21 B. 279
3. (1911) I. L. R. 38 C. 547.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Tyabji.

The Municipal Council of Tirupati by the Chairman at Tirupati ... *Appellant** (*Defendant*)

v.

Sree Mahant Prayag Dossjee Varu ... *Respondent* (*Plaintiff*).

Municipal Council of Tirupati *v.* Sree Mahant Prayag Dossjee Varu

District Municipalities Act—"Money-lender"—Meaning of—Lending transactions to be numerous, continuous and systematic—Not casual or intermittent—Use for public purposes—Stabling Devasthanam horses and coaches used to carry drums or pilgrims specially honored—Discretion in trustee as to persons to use—Purpose, public notwithstanding.

Any person who casually or intermittently invests his surplus funds on mortgage or on personal security cannot be considered to follow the calling of a money-lender so as to be chargeable for tax on that footing under the District Municipalities Act; to make him liable, his money-lending transactions must be so numerous, continuous and systematic that his calling might appropriately be called the trade or business of money-lending.

Buildings used for stabling Devasthanam coaches and horses which are employed in carrying drums in temple processions or allowed for the use of respectable pilgrims to whom such honour is shown by the Mahant are exempt from tax as buildings used for public purposes. Such uses are uses for public purposes notwithstanding that the persons who make use of them do not belong indiscriminately to all castes but a discretion is vested in the trustee as to the members of the public to whom the privilege is to be allowed.

Second Appeal from the decree of the District Court of North Arcot in Appeal suit No. 97 of 1912 preferred against the decree of the Court of District Munsif of Tirupati in O. S. No. 3 of 1911.

Venkata Raghava Aiyar, for *L. A. Govinda Raghava Aiyar* for Appellant.

K. Srinivasa Aiyangar and *S. Gopalasami Aiyangar* for Respondent.

The Court delivered the following

Judgment:—The first question for decision in this second appeal is whether the plaintiff (the Tirupati Mahant) is liable to be taxed under S. 53 of the District Municipalities Act read with Schedule-A., cl. (3) as a "person who exercises" the "calling" of "money-lender". The learned Vakil (Mr. Venkataraghavier) who appears for the appellant (the Tirupati Municipality) argues that lending out moneys even occasionally

* S. A. No. 2607 of 1912. 13th July 1914

Municipal Council of Tirupati v. Sree Mahant Prayag Dossjee Varu.

is following a " calling " and that that " calling " is the " calling " of a money-lender. He relies for this contention on certain observations in *Jennings* v. *The President, Municipal Commission, Madras* [1]. That case was decided on the interpretation of S. 103 of the City of Madras Municipal Act of 1884 read with Sch. A of that Act. The whole arrangement of the classes of persons liable to pay Municipal taxes in Sch. A. of the City of Madras Municipal Act of 1884 is different from the arrangement of the classes of persons made liable in Sch. A of the District Municipalities Act. The term " money lender " does not occur in Sch. A of the city of Madras Municipal Act whereas it occurs specifically in the District Municipalities Act. The case in *Jennings* v. *The President, Municipal Commission, Madras*[1] only decided that a Benefit Society was a person carrying on a calling (that is the calling or business of a Benefit Society) when it invested funds for profit. That case did not decide that such a Benefit Society carried on the calling or profession of a " money-lender." The word " money-lender " is not expressly defined in the District Municipalities Act but we do not think that any person who casually or intermittently invests his surplus funds on mortgage or on personal security must necessarily be considered to follow the calling of a money-lender. As indicated in the case in *Kunmatta Chinnarappa* v. *Kona Timma Reddi* [2] " the money-lending transactions " must be so " numerous, continuous and systematic " that it might appropriately be called the " Trade or business of money-lending." The facts found in the present case do not prove the transactions of loan entered into by plaintiff's predecessors to have been so continuous, numerous and systematic and the learned District Judge was right in his conclusion that the plaintiff is not liable to be taxed as coming under the class of "money-lender" mentioned in sch. A. of the District Municipalities Act.

The next question is whether the building used for stabling the Devastanam coaches and horses is entitled to be exempted as used for a public purpose, the finding being that some of the horses are used to carry drums in the temple processions and others are used by respectable pilgrims to whom such an honour is shown by the Mahant. We think that such uses are uses for

1. (1886) I.L. R. 11. M. 253. 2. (1911) I. M. W. N. 111 at page 113.

public purposes notwithstanding that the persons who make such use of the vehicles and horses do not belong indiscriminately to all castes and creeds and that a discretion is vested in the temple Vicharanakarta as to the members of the general public to whom such use is to be permitted of the said vehicles and horses.

Then it is contended that the plaintiff suing as the temple Trustee is not entitled to recover the tax levied on the stable building which belongs to him in a different capacity, that is, as head of a mutt to which the building belongs. But the facts show that plaintiff paid the tax as occupier and not as owner of the building. As he occupied the building by stabling the Devastanam horses and carriages there and paid the tax out of the Devastanam funds and not the Mattam funds, he was entitled to sue for the refund in his capacity as occupier, that is, in his capacity as temple trustee.

Lastly it is contended that the declaration granted the plaintiff. (besides the refund of the illegally collected tax) is worded too widely and that this is not a case in which, in the discretion of the Court any declaratory relief need be given. We agree with the contention and we direct that the declaration as to the future rights and liabilities of the parties be omitted from the decree.

With this small modification the Lower Court's decree is confirmed with costs on the appellant.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: —Mr. Justice Oldfield and Mr. Justice Napier.

Srimath Kidambi Jagannathacharyulu Ayyavarlu ... *Appellant** (*Plaintiff*).

v.

Pidipiti Kutumbarayadu and another ... *Respondents* (*Defendants*).

Madras Estates Land Act (Act I of 1908), S. 3 (2) d—Jurisdiction of Civil Courts—Inam Village—No Presumption as to grantee not being owner of Kudivaram at the time of grant—Burden of proof.

The party seeking to oust the jurisdiction of the ordinary Civil Court must establish his right to do so and there being no presumption that the person to whom an inam has been granted was not the owner of the kudivaram at the time

* A. A. O. No. 294 of 1913. 29th July 1914.

Jagannatha-charyulu *v.* Kutum-barayadu

of the grant, in the absence of any admission of the plaintiff or proof by the defendant that he did not own the kudivaram, the jurisdiction of the civil courts would not be ousted.

Indety Chinna Nagadu v *Potu Kanchi Venkata Subbaya* (1) *Veerabadraya* v. *Sonti Venkanna* (2) followed.

Appeal from the order of the Court of the Temporary Subordinate Judge of Masulipatam in A. S. No. 172 of 1912 preferred against the decree of the Court of the Additional District Munsif to Masulipatam in O. S. No. 479 of 1910 (Bezwada).

P. Nagabhushanam for Appellant.

P. Somasundaram for Respondents.

The Court delivered the following

Judgment:—The learned Subordinate Judge has held that the plaintiff an agraharamdar should have sued to eject his tenants, the defendants, in a Revenue Court, not before the District Munsif, on the ground that the suit village is an estate. The Appeal has been argued on the grounds that (1) burden of proof regarding the character of the suit village was imposed on the plaintiff wrongly (2) there was, in any case, a failure to consider material evidence.

The plaintiff does not rely on S. 8. Estates Land Act; and the question therefore is only whether this village is an estate within the meaning of S. 3 (2) (d); that is whether (1) the land revenue alone has been granted in inam (2) the grantee was a person not owning the kudivaram. Now if the nature of his tenure were under consideration with direct reference only to his right to sue in ejectment, there is no doubt that the authorities cited by the lower court would have been in point and its conclusion correct. But the dispute at present is as to jurisdiction, and as to it the first rule is that the party seeking to oust the jurisdiction of the ordinary civil courts must establish his right to do so. This is recognised in *Indety Chinna Nagadu* v. *Potukanchi Venkata Subbaya* [1] a case closely resembling the present and *Veerabadraya* v. *Sonti Venkanna* [2]. This rule is founded on clear and general considerations and distinct reason must be required to justify departure from it. Of course, as observed in the second decision referred to an anomaly seems apparently to exist in the *onus* being placed on different parties in the same suit for the purpose of deciding the

1. (1910) M. W. N. 639. 2. (1913) 24 M. L. J. 659.

Jagannatha-Charyalu v. Kutumbarayadu

question of Jurisdiction and for deciding the question of the landlord's right to eject. And this led one of the learned Judges in *Adusumalli Suryanarayana* v. *Atchuta Potanna* [1] to describe this distinction as "a little too fine and far-fetched," whilst the other thought it necessary to explain it. In doing so he first, as we understand him, accepted the validity of the general rule, as above stated; but he then referred to the presumption "which courts have recognised about grants from the Crown being grants of the revenue only" as sufficient to turn the scale in the defendant's favour in the absence of other grounds for an affirmative conclusion. If this means only that proof or an admission of the Inam character of the village raises a presumption that the first requirement of S. 3. (2) (d) has been complied with, *i.e.*, that the grant was of the land revenue alone, it may be accepted. And it is probable that this interpretation is correct, since such a presumption was a sufficient ground of decision in the case then under disposal, one in which plaintiff relied only on pleas that his grant included both *Melwaram* and *Kudivaram* or in the alternative that he had subsequently acquired the latter. These alternatives alone were considered in *Venkatesasastrulu* v. *Diviseetharamudu* [2] and only the second of them in *Ponnusami Padayachi* v. *Karappudayan* [3] the judgment of Miller J. stating expressly that the first of them as well as the alternative relied on in the present case, the plaintiff's ownership of the Kudivaram prior to the grant, were negatived by the circumstances. All these cases in fact differed from the present, because the question in them was only of the extent of the grant or the plaintiff's subsequent acquisition of the Kudivaram, not of his ownership at the date of the grant regarding which plaintiff here admits nothing, arguing that it is for the defendants to prove that it was not his.

The reply attempted to this argument is that the point is covered by a presumption, which must be drawn in the defendant's favour. But it has not been shown how such a presumption can be justified on its merits or supported by authority. On the merits it is not clear that there is any necessary or probale connection between the grant of an agraharam

[redacted] J. 99.
3. (1914) 26 M. L. J. 285.

Jagannatha-Charyalu v. Kutumbarayadu

and the grantee's possession prior to it of any right in the land; and it is contended that the reasons against presuming a grant of the Kudivaram to non-resident Brahmins are valid also against a presumption that they did not own the Kudivaram at its date; the answer is that in the present case the non-residence of the plaintiff's ancestor, the grantee, has yet to be proved and that, when the defendants have proved it, it will no doubt afford a ground of decision. As regards authority no recognition of the presumption proposed is to be found or is to be expected in the majority of the cases already referred to, since it was unnecessary for their decision. On the other hand the learned Judges responsible for *Veerabadrayya* v. *Sonti Venkanah* [1] said "It is not easy to hold that such a presumption is justifiable." And its legitimacy was negatived directly in *Indety Chinna Nagadu* v. *Potu Kanchi Venkatasubbaya* [2]. Adequate reason for dissent from these two decisions has not been shown. The conclusion entailed is in accordance with *Indety Chinna Nagadu* v. *Potu Kanchi Subbiah* [2] that the Lower Court erred in imposing the burden of proof on the plaintiff in respect of the second question arising under S. 3 (2) (d), that relating to the ownership of the Kudivaram at the date of the grant of the inam.

The Lower Court's decision must therefore be set aside. It must re-admit the appeal and dispose of it in the light of the foregoing. Provision for costs in this Court will be made in its final decree in accordance with the result. In these circumstances it is unnecessary to deal with the other ground argued in this Court, that material evidence was not considered.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Justice Miller.

The Salem Town Bank (Ld.) by Secretary T. V. Appanna Aiyangar ... *Petitioner** (*Plaintiff.*)

v.

K. Ramaswami Aiyar and others ... *Respondents* (*Defendants*).

Salem Town Bank (Ld.) v. Ramaswami Aiyar.

Hindu Law—Liability of sons for the debts of the father—Creditor not restricted to suit against all sons or against each for aliquot part.

Where sons are sought to be made liable for a debt of their deceased father, there is no rule restricting the creditor to a suit against all the sons or if he sues

* C. R. P. 487 of 1908.

1. (1913) 24 M. L. J. p. 659.

one only to a suit for a portion of the debt, proportioned to his share in the joint family property; he can get a decree for the whole amount payable out of the joint family property or separate property of the father in the hands of the son.

Civil Revision Petition against the revised decree of the Court of the Principal District Munsif of Salem in S. C. Suit No. 948 of 1907, dated the 14th day of November 1907.

T. M. Krishnasami Aiyar for Petitioner.

L. A. Govindaraghava Aiyar and *K. Jaganadha Aiyar* for Respondent.

The Court delivered the following

Judgment:—In my opinion the decree should have been against the second defendant for the whole amount of the debt to the extent of his share of the joint family property and any other assets being separate property of his father which may be in his hands, but not against the shares of the 3rd, 4th and 5th defendants against whom the suit is barred. I have not been shown that these shares are held by the 2nd defendant on their behalf in any capacity which would warrant a decree against him and, in the absence of the owners, for the seizure of their shares by the creditor.

On the other hand I am unable to accept the argument that each one is liable only for a portion of the debt proportioned to his share in the joint family property. I have not been referred to any authority restricting the creditor to a suit against all the sons for the whole, or if he sues one only, to a suit for a portion of his debt. The authority seems to be the other way.

I modify the decree by directing the 2nd defendant to pay the plaintiff's claim so far as his share of the joint family property will go to satisfy it. It is not alleged that his father left any separate property.

The appellant succeeds in part, and is in part successfully resisted. No costs will be awarded in this Court, except that the plaintiff must pay the 3rd and 4th defendant's costs.

Rajah of Karvetnagar v. Govinda Mudali

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Ayling and Mr. Justice Tyabji.

The Guardian to the property of the Minor Rajah of Karvetnagar ... *Plaintiffs** (*Appellants*)

v.

Pandur Govinda Mudali ... *Defendant* (*Respondent*)

Madras Estates Land Act, S. 195—Plea that amount claimed is in excess of amount due only barred—Not any other plea as to maintainability of the suit.

S. 195 of the Estates Land Act bars only the plea that the amount claimed is in excess of the amount due; it does not bar any other plea that the ryot may raise as to the maintainability of the suit.

Tender of Patta is not a condition precedent to suits for rent instituted after the coming into force of the Estates Land Act, though in respect of Fuslis before the Act.

Second Appeal from the decree of the District Court of North Arcot in A. S. No. 396 of 1911, preferred against the decree of the Court of the Revenue Divisional Officer of Chandragiri Division in Suit No. 60 of 1911.

L. A. Govindaraghava Aiyar for Appellant.

D. V. Neelamegachari for Respondent.

The Court delivered the following

Judgment:—In so far as the claim for Faslis 1317 and 1318 is concerned, the order of the District Judge remanding the suit for disposal on its merits is correct. The Revenue Divisional Officer appears to have overlooked the fact that the defendant in his written statement not only disputed the correctness of the amount of rent claimed by the plaintiffs, but pleaded that in consequence of the plaintiffs failure to tender him a proper patta the suit was not maintainable. Whether this latter plea was valid or not (a point with which we shall deal later) the defendant was entitled to have it adjudicated on. S. 195 of the Madras Estates Land Act is no obstacle, for it merely enacts that the Collector shall, except for special reasons refuse to take cognisance of the plea that the amount claimed is in excess of the amount due and not of any other plea which the ryots may raise against the maintainability of the suit. The Revenue Divisional Officer has in effect by decreeing the plaintiff's claim as sued for fuslis 1318 and 1319 struck out the defendant's whole defence to the suit. This is illegal.

* S.A. 1559 of 1912. 5th November 1913.

As regards Fusli 1317, the District Judge has held relying on *Sri Rajah Bomma Devara Venkata Narasimha Naidu* v. *Sajja Satayya* [1] that as there was no tender of patta, the suit for rent will not lie. In that case the suit was instituted before the Madras Estates Land Act came into force so that it is no authority on the point now under consideration. The cases of *Sri Rajah Satrucharla Veerabhadra Raju Garu* v. *Gunta Rushmi Naidu* [2] and *Muthiah Chettiar* v. *Ramaswami Chettiar* [3] are clear authorities for holding that under the present Act tender of patta is not a necessary condition precedent to a suit for rent.

Rajah of Karvetnagar v. Govinda Mudali

The suit in so far as it relates to fusli 1317 must therefore be remanded to the Revenue Divisional Officer for disposal according to law.

Costs in this and the District Court will be costs in the cause.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Wallis and Mr. Justice Ayling.

Chullile Peetikayil Nammad ... *Judgment-creditor* *

and

E. Othenam Nambiar ... *Judgment-debtor.*

E. Cheela ... *Claimant in M. P. No. 38 of 1913.*

Civil Procedure Code, Act V of 1908)—O. 21, R. 46—Mortgage debt—Mortgagee in possession—Actual or constructive—Mode of attachment.

The proper mode of attaching a mortgage debt is that indicated in O. 21, R. 46 ; the fact that the mortgagee is in possession actual or constructive of the mortgaged property makes no difference: *Nataraja Aiyar* v. *The South Indian Bank Ltd* (4) followed.

Chullile Peetikayil Nammad v. Othenam Nambiar

Case stated under O. XLVI, R. 1, C. P. C. 1908 by the District Munsif, Cannanore whether attachment of mortgage debts for decrees in small cause suits should be made under O. XXI, R. 46, C. P. C. or under O. XXI., R. 54, C. P. C.

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* Referred case 2 of 1914. 30th April 1914.

1. (1911) M. W. N. 139.

2. (1912) M. W. N. 441.

3. (1913) M. W. N. 618.

4. (1911) I. L. R. 37 M. 51. s. c. 22. M. L. J. 105.

Chullile Peetikayil Nammad v. Othenam Nambiar

The following is the reference by the District Munsif to the Registrar, High Court.

SIR,

I beg to submit under O. XLVI, R. 1 C. P. C. 1908 what I consider to be an important point of procedure for the opinion of the Honourable High Court.

2. In execution (S. C. E.P. 1068 of 1912) of the decree in Small Cause Suit No. 1650 of 1912 on the file of this Court the decree-holder has attached and seeks to sell what he has described as the judgment-debtor's right to the mortgage amount and interest due under a panayom. It is admitted that the real right of the judgment-debtor is kanom there being a lease back to the mortgagor. The term of the lease has expired but the mortgagor is still holding over. The attachment was made under O.XXI, R. 46, as a debt not secured by a negotiable instrument. The decree has not been transferred to the original side for execution. Under these circumstances the question arises and a co-mortgagee as claimant in S.C.M.P. No. 38 of 1913 raises it whether the mortgage right has been rightly attached under O. XXI, R. 46 or ought to have been attached as immoveable property under R. 54. *Nataraja Aiyar* v. *The South Indian Bank, Limited* (1) is an authority for the proposition that a debt secured by a hypothecation bond or a simple mortgage should be attached under R. 46 as "a debt not secured by a negotiable instrument." The principal authorities on the point have been referred to there. But in none of these, (except in the case reported in I. L. R. 19 B. page 121 from the report of which it does not appear in what right the mortgagor continued in possession) the question appears to have arisen as to the mode of attachment of mortgages with possession and any observations as to such mortgages were only *obiter*. In the present case though the mortgagee is not in actual possession he is in constructive possession through his tenant the mortgagor and is now entitled to actual possession.

3. For our purpose mortgages may be divided into two classes :—

i. Mortgages which do not give to the mortgagees a right to possession.

ii. Mortgages which give such right.

(a) and the mortgagee is put in actual possession or

(b) the mortgagor takes back the property on lease from the mortgagee and thus continues in possession (1) whether the term of the lease has expired or (2) not.

4. The case under consideration falls under II (b) (1). To allow the decree-holder to attach the mortgage debt would only result in benefit to the mortgagor and as has been observed by Sir Lawrence Jenkins, Chief Justice, in a case in which it was necessary to decide whether purchase in court auction of the mortgage debt would carry with it the mortgage security "to benefit him is no part of any one's scheme." *Tarvadi Bholonath* v. *Bai Kashi.*

5. After the decision of the Madras High Court the practice as to attachment and sale of hypothecation debts does not matter. I understand that the practice has been uniform in this court to attach and sell kanom rights as immoveable property. I am of opinion that this practice is correct, but in view of the *obiter dicta* in the cases referred to in the Madras cases above quoted and the absence of an express decision of the Madras High Court upon the point, I have reasonable

1. (1911) 22 M. L. J. 105.

doubts in the matter and beg to submit the following question for the opinion of the Honourable High Court.—

Chullile Peetikayil Nammad v. Othenam Nambiar

"Whether under the circumstances aforesaid the decree holder was right in attaching the mortgage debt as one not secured by a negotiable instrument under O. XXI, R. 46 C. P. C. 1908 or whether he ought to have attached it as immoveable property under O. XXI, R. 54, after getting the decree transferred to the Original Side"

6. It is submitted that an authoritative opinion upon the above point (if not also in connection with the various kinds of mortgages aforesaid) will set right any irregularities in procedure in the Mofussil Courts and save embarrassing consequences.

7. The material papers are herewith submitted.

The Court delivered the following

Judgment:—We are not prepared to differ from the decision in *Nataraja Aiyar* v. *The South Indian Bank, Limited* [2] where all the authorities are considered, and are of opinion that the fact of the mortgagee being in possession actual or constructive of the mortgaged property makes no difference. The answer to the first question is in the affirmative.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sankaran Nair and Mr. Justice Spencer.

Venkatesha Mallia ... *Appellant* * (*Plaintiff*)

v.

Bammampalli Ramayya Hegade and others. *Respondents.*

Venkatesha Mallia v. Bammampalli Ramayya

Religious Endowments Act, S. 18—Sanction given to two persons—Suit by one alone—Maintainability of.

Where sanction is given under S. 18 of the Religious Endowments Act to two persons one of them alone cannot sue without getting the sanction amended.

Appeal from the decree of the District Court of South Canara in O. S. No. 62 of 1906.

K. Ramanatha Shenai for Appellant.

K. Narain Rao, B. Sitaram Rao and *K. Y. Adiga* for Respondents.

The Court delivered the following

Judgment:—Under S. 18 of Act XX of 1863 the District Judge gave sanction to two individuals to sue for the removal of

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* A. No. 182 of 1910. 28th July 1914.

1. (1901) I. L. R. 26 B. 305 at p. 310.
2. (1911) I. L. R. 37 M. 51, S. C. 22 M. L. J. 105.

Venkatesha Mallia v. Bammiam-palli Ramayya.

the Respondents who are the Mokhassors of the Shri Anantha Padmanabha temple of Pudur for misfeasance, breach of trust or neglect of duty.

Although the sanction was given jointly to both, only one of the individuals took action thereon and sued the trustees.

When the suit came on for trial before the same Judge who gave the original sanction, a preliminary objection was taken that the suit was bad because the joint-sanction-holder had not joined in the suit. The Judge upheld this objection and dismissed the suit holding that the plaintiff could not prosecute it alone. He further expressed a doubt as to the plaintiff's *bona fides*. The question before us therefore is whether one man should be allowed to sue under S. 14 of this Act upon the strength of a sanction given to two men. Such sanctions are a condition precedent to the exercise of the right of suit (*Venkateswar in re* [1]) and it is open to the Court to amend the order of sanction at any time (*Srinivasa* v. *Venkata* [2]), but the plaintiff seems to have made no attempt to move the Court to alter the sanction by getting it granted in his name only. In the case of *Mahamed Atthar* v. *Ranja Khan* [3] this point was considered and the learned Judges held that when sanction had been granted to three persons and two of them withdrew and one of the three joining with him two new persons brought a suit under S. 14 of the Act the suit was not defective by reason of two of the three plaintiffs being persons to whom leave to sue had not been awarded. There, no objection was taken at the trial and no issue framed as to the maintainability of the suit.

It was observed by the High Court that as the same Judge who gave the leave under S. 18 also entertained the suit he must have tacitly given permission to the two new men to become plaintiffs along with Ranjakhan. So here as Mr. Hardinge granted sanction to two petitioners in his order of January 8th 1906 and subsequently on March 1st 1908 he himself dismissed the plaintiff's suit because the Shivalli Brahmins had not been joined as a party and at the same time doubted the *bona fides*

1. (1886) I. L. R. 10 M. 98. 2. (1887) I. L. R. 11 M. 148.
3. (1907) I. L. R. 34 C. 587.

Venkatesha Mallia v. Bammampulli Ramayya

of the plaintiff, it may be taken that he refused to allow the plaintiff to sue singly.

Such sanctions for instituting suits against trustees have to be construed strictly without enlarging their scope (*Sayad Hussain Miyan* v. *The Collector of Kaira* [1]) the object of requiring sanction being to protect managers from vexatious suits.

The words in S. 14 of the Act "any person or persons interested in any mosque etc., may *without joining as plaintiff with any other person interested therein* sue before the Civil Court the trustee, manager, etc. " seem to be enabling words intended to give individuals a right to sue individually without the necessity of all the worshippers of the particular temple or religious institution joining as plaintiffs. With all respect to the learned Judges who decided *Mahomed Athar* v. *Ramjan Khan* [2], we do not consider that these words are intended to refer to the persons who hold the sanction granted under S. 18.

Cases may occur in which it must be inadmissible to grant sanction to a particular individual either on account of his character, personal motives or his solvency, and yet if he joined with some one whose very name would be a guarantee against the suit being improperly conducted a Court would be justified in granting a joint sanction where it would have refused leave to the single applicant.

We are therefore of opinion that this suit was rightly dismissed.

The appeal is dismissed with costs.

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1. (1895) I. L. R. 21. B. 257. 2. (1907) I. L. R. 34 C. 587.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Oldfield and Mr. Justice Napier.

Choragudi China Kotayya ... *Petitioner** (*Defendant*)

v.

Sri Raja Varadaraja Appa Row Bahadur Zamindar Garu ... *Respondent* (*Plaintiff*).

Choragudi China Kotayya v. Raja Varadaraja Appa Row.

Civil Procedure Code (Act V of 1908) Order 23, R. 1 S. 107—Applies only to pending suits—Jurisdiction—Appellate Court—No power to give leave to withdraw.

C. P. C., O. XXIII, R. 1 applies only to pending suits and has no reference to appeals or second appeals The appellate Court has therefore no power to allow a suit to be withdrawn with liberty to file a fresh suit. *Eknath* v. *Ranoji* (1) followed.

Petition under S. 115 of Act V of 1908, praying the High Court to revise the decree and order of the District Court of Kistna at Masulipatam in A. S. No. 92 of 1912 and I. A. No. 937 of 1912 preferred against the decree of the Court of the Additional District Munsif of Masulipatam in O. S. No. 136 of 1910 (Gudivada).

V. Ramdas for the Petitioner.

P. Nagabhushanam for the Respondent.

The Court delivered the following

Judgment:—The question raised in this Revision Petition is whether plaintiff (appellant) can be permitted by the appellate Court to withdraw from his appeal with liberty to bring a fresh suit, his suit having been dismissed in the lower Court and his appeal having been against that dismissal. The District Judge of Kistna states in his judgment that on the hearing of the appeal, the appellant wished to file a number of fresh documents, that he declined to give him permission and that, then, the appellant made the application referred to, which application was granted by the court on payment of costs. It is contended before us that the lower appellate Court had no power to allow him to do so.

The question turns on the construction of O. XXIII, R. 1 and the respondent who was appellant in the lower Court relies, on S. 107 C. P. C., as vesting this power in the appellate Court. Admittedly, this power has frequently been exercised and we are referred to two cases, one *Tirupati* v. *Muttu* [2], and the

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*C. R. P. No. 599 of 1913. 30th July 1914.

1. (1911) I. L. R. 35 B. 261. 2. (1888) I. L. R. 11 M. 322.

other *Chidambara Mudali and others* v. *Kozhandavelu Mudali and others* [1], where the High Court permitted it to be done in Second Appeal. The point, however, was not argued in those cases and we have therefore, to see whether on the true construction of the Civil Procedure Code, the power exists. The language of the Order is as follows:—

O. XXIII, R. 1, cl. (1) :—"At any time after the institution of a suit the plaintiff may withdraw his suit or abandon part of his claim.

Cl. (2):—"Where the Court is satisfied (a) that a suit must fail by reason of some formal defect or (b) that there are other sufficient grounds for allowing the plaintiff to institute a fresh suit, it may grant the plaintiff permission to withdraw from such suit or abandon such part of a claim with liberty to institute a fresh suit."

(3) " Where the plaintiff does so without the permission above referred to, he shall be liable for such costs as the court may award and shall be precluded from instituting any fresh suit."

Considering clauses (1) and (3) first, it must be apparent that they cannot refer to a suit that has already terminated in a decree, because clause (3) covers the whole of the ground covered by clause (1). That is to say, clause (3) applies to every case where a plaintiff withdraws his suit or abandons part of his claim.

It is to be noted in passing, that the language of clause (3) varies slightly from that of clause (1), the words in clause (3) being "withdraws from a suit," while in clause (1) it is " withdraws his suit", and that the word "from" also occurs in clause (2). Some argument might be based on this change of language in clause (2) were it not apparent that clause (3) which is couched in the same language, has reference entirely to clause (1). The variation must, we think, be purely accidental. The language of S. 373 of the Old Code was "withdraw from" all through. As, therefore, clause (3) applies entirely to clause (1), it necessarily follows that in all suits withdrawn without permission the Court has power to award costs after the withdrawal. This power clearly cannot exist in a case where the suit has terminated in a decree against the plaintiff, because costs have

1. (1912) M. W. N. 1003.

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already been provided for in the decree and cannot be awarded after the withdrawal. Further, it has never been suggested that a party whose suit has been dismissed with costs has power apart from cl. (2) to have the decree set aside. The suit has terminated and the claim has merged in a decree. If a party does not wish to execute his decree he need not do so, and if he desires to abandon part of the amount which has been decreed to him, it is open to him to certify satisfaction of that part. It must follow therefore that clauses 1 and 3 do not include suits which have terminated in a decree.

We now come to cl. (2). It is obvious that cl. (2) does not give the permission to withdraw and abandon, that permission being unnecessary under clause (1). What it does is to authorise the Court in certain circumstances where a party wishes to withdraw, to give him liberty to institute a fresh suit. It seems to follow from this that the liberty to institute a fresh suit can only be given in circumstances in which the applicant is entitled under cl. (1) to withdraw. Further, paragraph (a) of cl. (2) of the rule is, in terms, only applicable to a pending suit and if paragraph (b) is to be read as limited to a case where a suit must fail, then that language would negative the construction asked for. But it is certainly open to argument that the words "there are sufficient grounds" are alternative to the words "a suit must fail", and not to the words "by reason of some formal defect", and it is on reliance on this reading that some argument can be based. Whatever meaning, however, is to be given to that language, it cannot we think, alter the basis of the clause and extend the right of withdrawal or rather be read to give the Court power to "permit" withdrawal. The language of this sub-clause being the same as that in clause (1) the same meaning should, primarily be applied to it. As to one part of the sentence, the position is quite clear. The words 'abandon such part of a claim" are not applicable to a suit which has terminated and therefore, the clause cannot possibly apply where the plaintiff, against whom a decree has been given, wishes to bring a fresh suit abandoning part of the claim and we should therefore, be driven to this position if we were to accept the respondents' contention, that no leave can be given in a terminated suit where part of the original claim is sought to be abandoned but that leave can be

given after decree, where the fresh suit is to be otherwise than for a part of a claim. There is however, a fatal answer to this in the last words of the clause, because the fresh suit to be permitted is specifically stated to be a fresh suit in respect of such part of the claim as well as "the subject-matter of such suit." The reading therefore would require the excision of the words "such part of the claim" from the sentence permitting the institution of a fresh suit. That not being permissible, it necessarily follows that the fresh suit must be in circumstances applying both to the "subject-matter of the suit" and "the part of a claim": and as it cannot apply in respect to a "part of a claim" after a decree has already been pronounced, it seems to follow necessarily that it cannot apply in respect of the "subject-matter of a suit," after a decree has already been passed. Applying the same chain of reasoning to paragraph (b) of clause (2) we get this position, first that the words "part of a claim" cannot apply after a decree; next that the "fresh suit" must have the same meaning for both parts of the sentence; and finally, that the "fresh suit" cannot be one to be brought after decree with the result, that, whether the words "other sufficient grounds" are alternative to "a suit must fail," or "some formal defect", they are alike subject to the limitation that no decree has been passed in the suit sought to be withdrawn. It may well be that during a pending suit leave may be given to withdraw on grounds other than that "the suit must fail." It may be that proper relief cannot in some cases be given by way of amendment, such as would give the plaintiff all that the circumstances entitle him to claim and that therefore he may be given permission to bring a fresh suit on withdrawal of the pending suit. But it is not necessary to decide that question here. All we have consider is, whether the language of this clause (2) is to be confined to a pending suit, as clauses (1) and (3) must necessarily be, or can be read as extending to a suit in which a decree has already been passed; and for the reasons given we are of opinion that it cannot be so extended.

The further argument remains however that the appellate Court can do what the first Court cannot do. One argument is that reconsidering the powers of the appellate Court the word "appeal" is to be substituted for the word "suit" and so the

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appellate Court got the power. The answer to this contention is this that if the word "appeal" is to be substituted for the word 'suit' it must be substituted all through the Order. The Order as made applicable to the appellate Court would then run as follows.—"At any time after the filing of an appeal the plaintiff may withdraw his appeal or abandon part of his claim, etc.

There are obvious objections to this reading of the Order. In the first place the words "abandon part of a claim" are no more applicable to an appeal than they are to a suit that has terminated in a decree; and secondly, there are ample powers to be found in the code for dealing with the merits of an appeal without the necessity for giving leave to file a fresh appeal. This, however, is not the construction sought for by the respondent, for it will not assist him. What he wishes to do is in effect, to alter the word "suit" into "appeal" in the first line, rule 1, clause (1) and read it "at any time after the filing of an appeal" and then leave the rest of the rule as it stands. This of course, cannot be a proper application of the Order to an appellate Court. The other method by which he would arrive at the powers he seeks to establish is by taking the whole rule *en bloc* and saying that the appellate Court could do it by reason of the words "at any time after the institution of a suit," his argument being that, although the first court having passed a decree cannot alter it, the appellate Court can do so, as the whole case is re-opened by the appeal.

It was this contention that made it necessary to examine the language of the rule minutely, and if the order is to be read as suggested above, that is to say, as limited to suits which have not terminated in a decree, it is obviously impossible to read the order otherwise when the suit is before the appellate Court. The language of the order cannot be construed, as to its subject matter, differently according to the Court which is construing it. The Code can apply the procedure of an Original Court to the appellate Court with the necessary variation in the terms. This is done specifically in O. XXII, R. 11; and section 107 generally provides for the exercise, by the appellate Court, of the same powers and the same duties as are conferred and imposed on Courts of original jurisdiction. S. 107 will, however, not avail the respondent in the manner he seeks to apply it, for, as shown above, the

Court of original jurisdiction has no power to permit the institution of a fresh suit after decree. The Respondent is, therefore in this difficulty, that if he wishes to apply O. XXII, R. 1, to the Court of appeal by virtue of section 107 it can only be done by substituting the word "Appeal" for "Suit" all through the rule which will not give him the remedy that he requires. No other construction is possible because, with regard to the suit itself the Original Court has no such power.

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The view that we have taken is in accordance with the decision in *Eknath* v. *Ranoji* [1] where the Court lays down that the language of O. XXIII, implies that a suit has not yet been disposed of. For the reasons given above, we are of the same opinion. The petition will be allowed with costs. The order of the lower appellate Court will be set aside and the lower appellate Court will take the appeal on its file and dispose it according to law.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

Muthukaruppa Mudali and others ... *Appellants* *
(Legal Representatives of Deceased Plaintiff).

v.

Pi. Mu. Kathappudayan and others ... *Respondents.*
(Defendants.)

Contract Act, S.127—Guarantee—Consideration—Advances on recommendation—Consideration for promise of guarantee.

Advances made on the recommendation of a person are not sufficient consideration in law for a subsequent promise by him guaranteeing their payment.

Muthukaruppa Mudali *v.* Kathappudayan

Napier, J.

Second Appeal from the revised decree of the District Court of Trichinopoly in A. S. No. 159 of 1905 preferred against the decree of the Court of the District Munsif of Ariyalur in O. S. No. 861 of 1904.

T. Rangachariyar for Appellants.

Respondents unrepresented.

The Court delivered the following

Judgment:—*Napier, J.*—Three points are argued in this second appeal. The first is that under the remand order of the

* S. A. No. 2226 of 1912. 11th August 1914.

1. (1911) I. L. R. 35 B. 261.

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Napier, J.

High Court the District Judge should have returned findings on the other issues of fact in the case. We are clear that the order was only on the question whether the contract of guarantee was supported by consideration on which he has returned a finding. The second, that the District Judge should have passed a decree in the terms of the supposed compromise. We accept his decision that no compromise binding on all the parties was effected. The third is, that the District Judge has erred in law in holding that there was no consideration. It is argued that the advances made to other persons on the recommendation of the 1st defendant were good past consideration for the contract. S. 127 of the Indian Contract Act says that anything done, for the benefit of the principal debtor may be a sufficient consideration to the surety. Consideration is defined in S. 2: " When at the desire of the promisor, the promisee.........has done.......... something, such act.........is called a consideration." I extract only that part of the definition relied on by the appellants. In our opinion, the facts of this case do not go so far as these words require. We are not referred to any words expressing the desire of the 1st defendant that advances should be given. In *Sindha Shri Ganpatsing* v. *Abraham* alias *Vajir*, [1] the words are interpreted to mean " Express or implied request or desire". The learned vakil for the appellants was unable to refer us to any case in which a recommendation was held to be within the words of the section nor is any support for the proposition to be found in the commentaries of Sir F. Pollock or Sir H. H. Shephard. In a case reported in *Juggot Indur Narain Roy Choudhry* v. *Nistarinee Dassee*, [2] decided subsequent to the passing of the Indian Contract Act, but, it may be arising before that date, there is a dictum that a mere recommendation by one party to another to lend money to a third party does not render the first party liable to repay the loan. This of course goes no further than that there is no promise but it is an indication of the light in which recommendations are regarded.

We may add that there can be no doubt that according to English law a recommendation alone cannot be valuable consideration. *Vide* Halsbury's Laws of England, Volume 7, paragraphs 793 and 794—consideration where is " the promisee

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1. (1895) I. L. R. 20 B 755. 2. (1875) 24 W. R. (Civil Rulings) 445.

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does some act (in India it would include 'has done some act') from which a third person benefits and which he would not have done but for the promise." There is nothing in this case which comes within this definition.

The result will be that the second appeal is dismissed. There will be no order as to costs.

Sadasiva Aiyar, J.:—I entirely concur in the judgment just now pronounced by my learned brother, and if I add a few words of my own, it is out of respect for the strenuous arguments of Mr. T. Ranga Chariar on the question of law which he has argued.

The question as to what kind of past request on behalf of the promisor followed by what kind of act on the part of the promisee forms good consideration for the subsequent agreement by the promisor is oftentimes a very difficult question. Loose expressions in the wilderness of English cases are likely to be of very little use in deciding this question in any particular case arising in an Indian Court. S. 2, Cl. (d) of the Indian Contract Act says "when, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise." The above definition is couched in the widest possible words, but it has been always held that the "something" which the promisee has done cannot be a merely illusory thing. For instance, if B asks his friend A to take Rs. 5 from A's left-hand pocket and put it into A's right-hand pocket and A accordingly transfers the money from his left-hand pocket into his right-hand pocket, A suffers no detriment at all by complying with that request of B. It would be against common sense to hold that A's above act at B's request will be good consideration for B's signing a promissory note in favour of A for Rs. 1000.

Under the English common law, the consideration "must always be present at the time of making the promise and there is no such thing as past consideration." A mere past request by the promisor to the promisee to do an act even to the promisee's detriment without a simultaneous understanding that it is to be recompensed in the future cannot make the promisee's act good consideration for a subsequent promise to recompense.

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But the Indian Act does not seem to require any such understanding. See *Sindha Shri Ganpatsingji* v. *Abraham* alias *Vajir* [1].

As I said already it is not every kind of act on the part of the promisee, though done at the promisor's request, which could support a subsequent promise and the act done by the promisee must be "good" or "valuable" consideration in the sense in which those terms appear in English Law though these words "good" and "valuable" do not appear in the Indian Contract Act which speaks only of lawful and unlawful considerations. The "mere doing of a thing which a person is already legally bound to do" is, of course, no consideration for a new promise in his favour (See *Manna Lal* v. *Bank of Bengal* [2])

There is very little in the circumstances of the case to show that when on the recommendation of the 1st defendant the plaintiff dealt with other persons, the plaintiff intended to do any service to the first defendant, intended the recommendation to have the character of a request on which he wished the plaintiff to act to the detriment of the plaintiff.

The distinction between the recommendation by A of B to C for a certain favour to be shown to B and a request by A to C to do a service to B may no doubt become in many conceivable cases a very thin distinction but, when we know the circumstances under which a particular recommendation or a particular request is made, it is not usually difficult in most cases to recognise the distinction. A desire or request shows much more earnestness and personal anxiety than a mere recommendation. In the present case, the finding that there was merely a recommendation of the principal debtors by the 1st defendant to the plaintiff is a finding of fact which cannot be interfered with in second appeal. I therefore agree that the second appeal should be dismissed.

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1. (1895) I. L. R. 20 B. 755. 2. (1876) I. L. R. 1. A. 309.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Tyabji.

Gopala Muppanar and others ... *Appellants** *(Plaintiffs)*

v.

Dharmakarta Subramania Aiyar and others ... *Respondents (Defendants) 1 to 9.*

Gopala Muppanar v. Subramania Aiyar

Religious Endowments—Hindu Temple—Right of worship—Agamas—Right of entry of Sudras into the temple—Burden of proof—Custom for exclusion to be made out—Practice—Second appeal—Decision on burden of proof—Interference in.

In a suit by the representatives of Ilaivaniyar community in the village of Panakudy against the Brahmins, Mudaliars and Pillais in that place for a declaration that they had a right to go as far as the Garbhagriham for acts of worship in the village temple plaintiffs adduced evidence to show that their right of entry into the hall was recognized in several important temples of Southern India and though the court below believed that evidence for the plaintiffs, nevertheless it dismissed the suit on the ground that that was insufficient to make out the plaintiff's right of entry to the plaint temple.

Held: that the Court below erred in holding that the burden was on the plaintiffs to show that they had the right of entry or were not excluded; on the other hand, as they belonged to one of the sub-divisions of the Sudra community, under the Agamas that regulated the temple rituals they were entitled to be in the Mahamandapam or outer hall and it therefore lay on the defendants to prove that by reason of any custom they were prevented from going beyond the Dhwajastambha.

In this view, the defendants having failed to make out a custom excluding the plaintiffs their Lordships felt justified in second appeal in giving a decree to the plaintiffs subject to the right of the defendants to stand in front of them.

Second Appeal from the decree of the District Court of Tinnevelly in A.S. No. 103 of 1911 preferred against the decree of the Court of the Additional District Munsif of Tinnevelly in O.S. No. (116 of 1909),

T. R. Ramachandra Aiyar for Appellants.

T. Rangachariar and *E.S. Chidambaram Pillai* for Respondents.

The Court delivered the following

Judgments:—*Sadasiva Aiyar, J*:—The plaintiffs are the appellants in this second appeal. They brought the suit out of which this second appeal has arisen as representatives of the Ilaivaniyar community in the village of Panakudy. The defendants repre-

* S.A. No. 1554 of 1912 18th August 1914.

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Sadasiva Aiyar, J.

ent the Brahmins, Mudaliars and Pillais in that village. The plaintiffs pray for the following main reliefs:—

"(*a*) a declaration as against the defendants and their communities, Brahmins, Vellalas and Mudaliars of the right of the plaintiffs and of their castemen residing at Panakudy to go so far as the Sabapathy Sannadhi and as far as the front of the Pulliarai in the Amman Sannadhi in the said Panakudy Sri Ramalingaswami Temple and worship the Swamies and Amman and to receive prasatham, etc., after performing Abishekam, Archanai, Neivediam, etc., during the Mandagapadi occasions and on ordinary occasions;" and

"(*b*) a permanent injunction restraining the defendants and their community from causing any obstruction to the plaintiffs and their castemen in their performing the above acts claiming the said right by virtue of such declaration."

The principal compartments of an ordinary Siva temple are (1) the Garbagriham where the principal fixed image is established and which is the holiest part of the temple; (2) the next outer hall called the Arthamantapam (Half-hall) and (3) a further outer hall which is called the Maha Mantapam or Big Hall. As the principal image usually faces east, these three rooms or halls lie usually east of one another. (In the Siva Temples the big outer Nanthi, the Flag staff and the Balipitam lie still further to the east). The two outer Mantapams (the Artha Mantapam and the Maha Mantapam) are, under a more elaborate classification subdivided into fractional portions. The Artha Mandapam is divided into (*a*) Antharala (*b*) Mukha Mantapa (*c*) Dwara Mantapa (*d*) Snapana Mantapa and (*e*) Vrisha Mantapa. The Maha Mantapam is subdivided into (*a*) Bahir Mantapam and (*b*) Nritha Mantapam. In the smaller temples (like the one in dispute), the only practical distinction is between the Garbhagriham and the portion east of its gate up to the Flag staff so far as access of caste Hindus is concerned. The technical names "Artha Mantapa" and "Maha Mantapa," *etc.*, do not at all appear in the evidence in the suit and though slight mention appears of a Thorana light and Thornakal, the learned District Judge is unable to come to any definite conclusion as to what is meant by these words. It appears from the evidence of the defence 9th witness, that "all those who can enter the temple" (that is, west of the Flag staff) "can go as far as

the Sabapathy Sannadhi," that is, up to the gate of the Garbhagriham and that no sub-division is made of the space into Artha Mantapa, Maha Mantapa, Nritha Mandapa, etc., as regards the right of access. The plaintiff's prayers are substantially for a declaration that they are entitled to stand for purposes of worship in what I shall call the outer Mantapam (that is, the hall between the Flag Staff and the Garbhagriham) and for an injunction against their being ejected therefrom.

It is the case of both parties that so far as the (Garbhagriham) is concerned, it is only the Brahmins *who belong to the temple priest sect* that could stand inside it for the purpose of worship. Ordinary Brahmins, Pillais and Mudaliars are entitled to worship from the outer Mantapam.

The Plaintiffs allege in their plaints that they belong to a caste which " according to immemorial custom and according to Hindu Shastras " (see 4th paragraph of the plaint) were entitled to worship standing in the outer Mantapam and that in November 1907, some Pillais and Mudaliars began to obstruct the members of the plaintiffs' community from standing in that Mantapam on the ground that the plaintiffs ' community have no right to go westward of the Dwajasthambam or the Flag staff. The lower appellate Court's conclusions might be shortly stated thus (using, mostly, its own language). " The plaintiffs have adduced a considerable body of evidence proving that their caste people are entitled to go beyond the Flag-staff and into the Arthamantapam " in the famous temples of Thiruchendur, Sankaranainar Kovil, Courtallam and Srivaikuntam, also in Thenkasi Melaivasal, Tinnevelly, Valliyoor, Kodayam and Tharuvoi. " Some of the witnesses on plaintiffs' side are of particularly good credit and the majority are of good position and means of knowledge." Plaintiffs' 8th and 11th witnesses are the trustees of the Tiruchendur temple, the 8th is a respectable Vellala, member of the District and Taluk Boards and the 11th is also a Taluk Board member. The plaintiffs' 9th witness is the Village Munsif of Sankaranainar Kovil and the Bhatter of the temple there and he pays a beriz of Rs. 750. The plaintiffs 15th witness is the manager of the Tinnevelly temple. The plaintiffs' 16th witness is a Brahmin Bank Agent. The majority of the plaintiffs' witnesses are of good position and knowledge. It is not likely that they would derogate from the dignity of the places

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which they hold sacred by admitting the right of entry of persons whose presence would otherwise constitute a pollution unless that right really existed". "The oral evidence on the plaintiffs' side is superior to that on the defendant's side. It certainly proves that in a number of temples of repute their caste is not excluded from the inner precincts of the temple. Hence there is nothing preposterous in the plaintiffs' claim. As their claim is shown to be conceded in a number of temples some of them in most important districts, and as there is no corresponding evidence on the defendants' side that it is refused in the temples of equal importance, there is some reason for viewing the plaintiffs' claim favourably in the present case."

(2) But though some presumption is raised from this strong evidence on the plaintiffs' side "it is not enough to transfer the burden of proof" from the shoulders of plaintiffs, that is, the burden of proving that their caste men have got a right to go beyond the flag-staff in this particular temple. The evidence on the plaintiffs' side as to this particular temple is "not so strong as to base an affirmative conclusion on it in plaintiffs' favour even when it is assisted by such slight probabilities as may arise from the evidence regarding other temples."

(3) "It is unnecessary to consider the defendants' evidence in detail because the plaintiffs' evidence is insufficient to transfer the burden of proof". It is immaterial that the defendants' witnesses who speak regarding the plaint temple are not entitled to much credit.

It is clear to me on a careful perusal of the District Judge's Judgment that in his opinion apart from the question of the burden of proof was originally on the defendants or if the burden of proof was sufficiently shifted on the defendants to prove *the exclusion of the plaintiffs* from the outer Mantapam, his conclusion would have been that the evidence on the defendants' side was wholly insufficient to establish such an exclusion. In short, the learned District Judge's judgment is entirely based upon the view that a Hindu belonging to a particular caste who wishes to go into the portions of the temple between the flagstaff and the Garbhagraham should establish by positive evidence that there is a custom in that temple which does not exclude him from any of those places.

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It seems to me, with due respect, that this will in many cases be tantamount to throwing an impossible burden upon a caste Hindu who wishes to worship in a temple. There are so many castes and sub-castes in India and the word castes is so very loosely used, the word not being confined to designate the four principal castes only. The Mudaliars, Pillais, Karakattars etc, though they are all supposed to belong to the Sudra caste, are usually considered and spoken of as separate 'castes.' So also among the Brahmins themselves, there are hundreds of sub-divisions throughout India. That a Hindu pilgrim belonging to one of the four Hindu main castes should be liable to be excluded at the will of a trustee or even worshippers then present at the temple from going beyond the flag-staff (up to which even persons belonging to other religions are allowed to go) and that he should be obliged to prove by positive evidence that there is no *negative* custom to exclude his caste-people seems to me to throw a distinctly unreasonable burden upon that Hindu pilgrim or worshipper.

The origin of image worship in temples is stated in the authoritative Puranas to have been in the Threthayugam and subsequent ages. In the first or Krithayugam, God was worshipped by mankind (which consisted of only one caste,) as immanent in the heart of everything and worship consisted solely in the service to one's fellow creatures. As the spirit of universal brotherhood decayed in the second age and notions of inferiority and superiority among men were indulged in, the inferior man was asked to worship God's higher manifestations in the superior man. Then, disputes naturally rose about relative superiority and inferiority and the sages considered it expedient to introduce image worship in order to prevent quarrels about superiorities and in order that all men (who had now become divided into four distinct castes) without unseemly squabbles about their relative excellences might worship God in common image (see the 4th Sloka in the 7th Skanda 14th chapter of Sreemath Bhaghavatam). Though image worship was thus recommended and laid open to all castes, it was clearly recognised as *not the highest form of worship*. (See succeeding slokas). The appropriate mode of worship for the Brahmins was held to be through the media of the Fire and the Sun and the highest form of worship for all castes was always recognised

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as that which prevailed in the first age. It is clear from the above that temples were intended for the worship of people belonging to all the four castes without exception. Even outcastes were not wholly left out of the benefits of temple worship, their mode of worship being however made subject to severe restrictions as they could not pass beyond the Dwajastambam (and sometimes not beyond the temple outer gate) and they could not have a sight of the images other than the procession images brought out at the times of festivals. The Agamas and the Thanthras which regulated the worship in the temples laid down rules as regards what caused pollution to a temple and as regards the ceremonies for removing pollution when caused. There are, it is well known, Thanthries in Malabar who are specialists in these matters of pollution. As the temple priests have not the special Saivite initiation of Dheeksha which entitled them to touch the innermost image and as the touch of the persons who have got no such initiation even though they be Brahmins was supposed to pollute the image, even Brahmins other than the temple priest Brahmins were in many temples not allowed to go into the Garbhagraham. In one of the Agamas, it is said (as freely translated) thus:—"Saivite Brahmin priests are entitled to worship in the Antharala portion. Brahmins learned in the Vedas are entitled to worship in the Arthamantabha. Other Brahmins in the front Mantabha, Kings and Vysyas in the Dwaramantabha. Initiated Sudras in the Bahir Mantabha," and so on.

There is no Mantabham or hall for worship east of Dwajasthambam and it is plain from the Tanthras and Agamas that the Sudras and all castes above Sudras (including the Anuloma mixed progeny of the four castes) are entitled to stand and worship at appropriate spots west of the Dwajastamba. I am therefore reasonably clear that it lies upon a person who wishes to restrict a Sudra or one who has a higher caste status than a Sudra from proceeding beyond the Dwajastamba into the next hall, to establish by proof of a recognised usage of that particular temple that the individuals belonging to that community or class are not entitled to go beyond the Dwajastambam.

Speaking for myself, if I were not bound by authority, I should like to hold that a custom which prohibits one who belongs to a community which is not lower than a Sudra caste

from going beyond the Dwajastamba is an unreasonable custom and ought not to be recognised. But as even such unreasonable customs, provided they are not grossly immoral have been held to override the law and Shastras if fully established by evidence, I think I am bound to follow such rulings.

As was said in the Judgment of the Court of First Instance in the Kamudi case *Sankaralinga Nadan* v. *Rajeswara Dorai* [1], "A Court of law cannot reject a custom because it is not in accordance with the principles of equity or individual notions of right and wrong. Courts of law have recognised and enforced customs of this character although they may be repugnant to generally received notions of what is just and proper. It is not for this court to examine whether the doctrines or usages obtaining in a particular temple are defensible from a logical or equitable standpoint in the light of modern enlightenment and civilisation, but to ascertain correctly, so far as the materials placed at its disposal permit, what the custom and usage is as observed and practised by the community for whose use and benefit the temple which is the subject of the litigation is dedicated and to be guided by them."

There are certain castes whose touch causes pollution not only to Brahmins but also to Sudras. They are usually spoken of as Yeenjathiyars. Of course even among Sudras, those who consider themselves more respectable will try to avoid the touch of the less respectable classes though there is no ceremonial pollution caused by such touch. For instance D.W.I. says in this case I am a Sudra, Caste, Vellala. *I do not touch the lower class of Vellalas.*" This is not because their touch causes any religious pollution to the higher class but simply out of the exaggeration and aberration of caste sentiments, the exaggeration being due to "class" sentiment having come in recent times to reinforce caste sentiment. So D.W.I. says "I will not touch a Maravar or Edayan" though he admits that Maravars, Edayans, Asaries and Kammalas, Pillais, Mudaliars and Pillais of inferior caste, all stand in the next compartment to the Brahmin's compartment mixed up together. See page 21, lines 20 and 21 of the Printed Book. D.W. 14 adds "Koravars, Reddis and Naiyakas are entitled to enter the temple" which means entering the outer hall. The plaintiffs community, though of the Sudra caste, was

1. (1908) I. L. R. 31 M- 236.

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a rather poor and uninfluential community till a few years ago while the Pillais and Mudaliars have been influential classes all along.

Now, coming to the caste status of the plaintiffs who are Ilaivaniers, it is first to be remarked that the Tamil word "Vaniyan" is derived from the Sanskrit "Vanija." Vanija (Baniya in the Northern Vernacular) merely means a Vysia who has trade as his occupation. The term 'Vaniya' in Tamil when used by itself has come to mean a trader in oils. A trader in oil especially when he crushes seeds to obtain the oil is considered to follow a sinful occupation. Vaniyans who press oil are also called Sekkans, sekku being the oil pressing machine. In the Census Report of 1901 Mr. Francis says at page 182 that for some obscure reason Manu classed oil-pressing as a base occupation." The reason is, however, clear enough. In chapter 4, sloka 85, Manu says that an oil-press (which destroys the lives of innumerable vegetable seeds is not better than a slaughter-house and that is the reason why the caste of the Sekkan or Thilavaniyan (shortly called Vaniyan) is considered an impure caste. But the plaintiffs in this case are Ilaivaniyans, that is, those who trade, in leaves, especially betel leaves and one ought not to be misled by the use of the word 'Vaniyan' as part of their caste-designation.

In Thurston's Castes and Tribes, Vol vi, page 360, Ilaivaniyars are described under the more high-sounding title of Senai Kudayan. They are also called Kodikkal Pillaimars or Pillaimars, who cultivate the betal vine. In the Madras Census Report of 1901 at page 177 it is remarked "In 1891 following the Tanjore District Manual *the were wrongly classed with Vaniyars, oil-mongers*, but they are superior to these in social position and are even said to rank above Nattu-Kottaichetties". This latter observation may not be accurate, but there can be no doubt that Ilaivaniyars have no connection whatever with the oilmongers or Vaniyars. Traders must, according to the true spirit of the Hindu Sastras be classed as Vaisyas. Owing however to the repression of Kshatriyas and Vysias by the Brahmins in the medeiaval ages, most of the Kshatriyas and Vysias have descended to the position of Sudras. But there can be no doubt that Ilaivaniyars are at least Sudras and do not belong to the

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communities which are lower than Sudras who are called Yeenajathiyars (like Pallars, Chucklers and Pariahs).

The castes below the Sudra are most of the Prathilomas and those who are classed as Anthiyajhas and out-castes or Pathithas. The *prima facie* right of the Brahmins to enter the temple was negatived in the case in *Venkatachalapthi* v. *Subbarayadu* [1] because the plaintiff, there, *it was proved* by the defence evidence, had, in the eyes of the community frequenting to temples became Pathitha and outcaste by marrying a widow. Though there are 28 Sivagamas, the Kamitagama is the Agama most quoted in these matters and the substance of the other Agamas has been digested in 18 paddhathies, of which Sakalagamasara, Varunapaddhathi and Nirvachanapaddhathi are those most frequently referred to. In the Nirvachanapaddhathi it is said that Sivadwijas should worship in the Garbhagriham, Brahmins from the ante chamber or Sabah Mantabam, Kshatriyas, Vysias and Sudras from the Mahamantabham, the dancer and the musician from the Nrithamantabham east of the Mahamantabham and that castes yet lower in scale should content themselves with the sight of the Gopuram. Taking it then as indisputable that the plaintiffs belong to the Sudra caste, they are *prima facie* entitled to worship from the Mahamantabham, one of the halls west of the bull near the Dwajastamba and east of the Garbhagraham.

In *Venkatachalapathi* v. *Subbarayadu*[1] the learned Judges quote without dissent the following observations of the Court of the First instance in that case; "Temple, of course, is intended for all castes, but there are restrictions of entry. Pariahs cannot go into the court of the temple even. *Sudras and Baniyas can go into the hall of the temple.* Brahmins can go into the holy of the holies." The learned District Judge in the present case admits that in *Venkatachalapathi* v. *Subbarayadu*, [1] the burden of proof that a Brahmin was excluded from worshipping in the inner precincts of the temple was imposed *on the defendants who were for exclusion,* because the plaintiff who was a Brahmin would ordinarily be entitled to access into inner precincts of the temple. On the same reasoning, if a Sudra would ordinarily be entitled to access into the hall beyond the Dwajastamba, it

1. (1890) I. L. R. 13 M. 293.

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is for those who wish to exclude a particular community which is not below the Sudra community from such access to establish the custom to exclude that particular community though they form a sub-division of the Sudras. In the well-known Kamudi case *Sankaralinganadan* v. *Rajeswara Dorai*, [1] the Shanars were excluded from access into the temple because overwhelming evidence proving that they belong to a caste whose touch was pollution (to Sudra), whose occupation of toddy drawing was of a sinful kind and who were therefore lower than Sudras in status was adduced by those who wanted to *exclude them and who unhesitatingly took upon themselves the burden of proving such right of exclusion*. No doubt the person who wished to exclude was the plaintiff in that case while here the plaintiffs sue for a declaration that they are entitled to be included; but I think that it would be a wholly unsatisfactory state of things that the status and rights of a community to take part in public temple worship should depend on whether a member of that community appears as a plaintiff or as a defendant. The contention of the defendants in this case is based *not* on the allegation that the plaintiffs belong to a caste which is below the sudra caste or whose occupation is of a sinful character, but only on the ground that whatever may be the practice in other temples, in this particular temple the usage is to exclude the plaintiffs from the temple proper. Such a plea not being proved and the plaintiffs as Sudras being *prima facie* entitled to worship from the Mahamantabham their suit ought to have been decreed.

In *Venkatachallapati* v. *Subbarayadu* [2], *Mr. Justice Muthusami Aiyar* says that "the right claimed by the plaintiff to enter into certain portions of the temple was a right which he was at liberty to assert *as a citizen and a Brahmin*." This shows that each of the principal castes can rely upon its *prima facie* right to enter a temple. In the famous Ambalapuzha temple case *Dewan of Travancore* v. *Vakji Jeraji* [3], the late Mr. M. K. Ramachandra Rao of the Travancore High Court (then the District Judge of Alleppy) a very orthodox and learned Brahmin Judge, decided that a Bhattia merchant was entitled to worship from the hall of that famous temple (though he was a foreigner

1. (1908) I.R. 31 M. 236.
2. (1890) I. L. R. 13 M. 297.
3. 14 Travancore, L. R. 56.

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to Malabar) because he belonged to one of the higher castes. I am clearly of opinion that it is unreasonable to call upon a person belonging to any of the thousands of such castes existing in India to prove affirmatively that his sub-caste has by prescription acquired a right to get into a particular temple among the tens of thousands of Hindu Temples dotted over India and if he could not do so, to shut him out of worship in that temple. It seems to me that provided he proves that he has the status of one of the main castes (or it may be, an intermediate Anuloma status between two of the main castes), it would be for those who wish to exclude him from the usual position in the temple assigned to a man of his caste status by the Agamas to prove that by the special custom of that temple, even a person of that caste status is excluded.

Reversing therefore the judgments of the lower Courts I would give a judgment in favour of the plaintiff granting the reliefs claimed in the prayers (a) and (b) of the plaint subject to a declaration that Brahmins Pillais and Mudaliars are entitled to take precedence over the plaintiffs by standing in front of persons belonging to the plaintiffs' caste in the covered portions of the temple between Dwajastambham and the Garbhagraham where it is intended that the worshippers shall stand and that the defendants 1, 2, and 4 to 9 (the defendants 1 and 2 in their individual capacity and not as trustees) shall be personally liable for the plaintiff's costs throughout and the defendants shall bear their own costs.

Reliefs now granted to the plaintiffs shall not operate so as to derogate from the exercise by Brahmins, Pillais and Mudaliars of the right of precedence.

Tyabji, J. The question involved in this appeal would primarily be dependent upon the terms of the original dedication of the temple. As there is no written trust-deed or its equivalent the Court is left to deduce from the materials before it what the terms of the dedication must have been.

Under these circumstances it seems to me that the proper course is to presume that the dedication was a reflex of the general religious notions prevailing amongst members of the community for whose benefit the temple was dedicated. It is reasonable to assume that the dedication would follow the

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current of prevailing religious views, if something at variance with the general notions was intended, those different intentions would in the ordinary course be clearly expressed.

The religious books cited by my learned brother are entirely in favour of the plaintiffs. This part of my learned brother's judgment I desire respectfully to adopt and follow. The learned District Judge should therefore have addressed himself to the question whether the defendants had proved that they had by the original dedication or by what took the place of dedication been given a right to exclude the plaintiffs from the portions of the temple which the plaintiffs claim to enter. The course he actually adopted was to start on the basis that the burden of proving that the plaintiffs had a right to enter the temple was initially on the plaintiffs. This may be conceded as part of the general rule that the plaintiffs must prove their case, but the failure to notice the considerations mentioned by my learned brother is very material. There was considerable evidence on the plaintiff's part to prove the existence of what is referred by the District Judge as a 'general rule permitting the access of their caste to temples'. Evidence to this effect was given with reference to the Tiruchendur, Tinnevelly and seven or eight other temples. It is carefully, I may say elaborately considered by the District Judge. His conclusion is that the plaintiffs' evidence is "superior" to that of the defendants on this question. Then the District Judge deals with what he considers to be the second part of the plaintiffs' case. He says "Plaintiffs' direct evidence as to their right to enter the temple is given by 13 persons besides the first plaintiff; nine belonging to Panagudi and the others more or less connected with the village". His view of the plaintiffs' evidence on this part of their case is not equally in their favour. In his opinion it is "insufficient to transfer the burden of proof". He considers it, therefore unnecessary to deal with the evidence of the defendants in detail. He does say however that "the defendants' witnesses who speak regarding the plaint temple are of much the same quality as regards credit and independence" and he refers to the admissions of the defendants that the inferior Vellalars can enter the temple, that the Ilaivaniyans are not excluded from communion with other castes

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in various social connections, that (according to the 13th witness for the defendants) sons of Dasis can enter the temple and that the 3rd defendant in his written statement refers to the plaintiffs' right to go as far as the Thornakkal. His final conclusion is thus expressed: "There is nothing in all that which justifies acceptance of the plaintiffs' witnesses' evidence in spite of their lack of credit and independence."

I feel the difficulty of appearing to interfere with a finding on fact in Second Appeal— a finding arrived at after so careful a consideration of the evidence. But the precision with which the learned Judge has intimated his views as regard the evidence of each of the parties on each point enables us to give effect to his views of the evidence on the basis of the more accurate understanding of the law which my learned brother's research has made possible.

Taking the evidence as appreciated by the learned District Judge, the facts found by him may be stated to be that the general practice in regard to the 9 or 10 temples above referred to is in favour of the plaintiffs, that with reference to the particular temple now in question the witnesses of both sides "fail from a lack of credit and independence"; that it is not proved by the plaintiffs that they have been allowed in the past to enter this temple as a matter of right; nor is it proved by the defendants that the privilege of excluding the plaintiffs from entering the temple has been asserted by the defendants and admitted in the past by the plaintiffs.

The result is not doubtful. The defendants have fallen far short of establishing to the satisfaction of the District Judge that usage long prevailing, uniform and clear leads to the conclusion that the religious trusts declared in connection with this temple gave to the defendants and their predecessors in title the right to exclude the plaintiffs from it, notwithstanding that the general religious sentiment would be opposed to such exclusion.

On the District Judge's view of the evidence therefore the plaintiffs should have been given a decree in terms of prayers (a) and (b) of the plaint subject to the declaration of the rights of the Brahmins, Pillays and Mudaliars to which my learned brother refers in his judgment. I agree therefore in the order proposed by my learned brother.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Raghavalu Chetty v. Pellati Sitamma.

Wallis Offg. C.J.

Present :—Sir John Edward Power Wallis, Kt. Offg. Chief Justice and Mr. Justice Seshagiri Aiyar.

Assam Raghavalu Chetty and another ... *Appellants** (*Plaintiffs.*)

v.

Pellati Sitamma and others ... *Respondents* (*Defendants.*)

Civil Procedure Code, S. 92—Parties—Order 1, r. 10—Alienees of trust properties—If necessary or proper parties—No relief can be granted against—Judgment—Evidence against, if party.

Per curiam. In suits under S. 92 of the Civil Procedure Code no relief can be had against alienees of trust properties.

Per Offg. Chief Justice.—Though an order adding them parties might if they so desire, be properly made, they ought not to be made parties against their will.

Per Seshagiri Aiyar, J.—Though no relief can be had against them they are proper, if not necessary parties to the suit. Assuming that the judgment would not operate as *res judicata* (a point on which His Lordship expressed no opinion), it would be strong evidence against the alienees in the subsequent suit for the recovery of the property.

Appeal from the Preliminary Decree of the District Court of Nellore in O. S. No. 27 of 1909, dated 24th January 1911.

M. O. Parthasarathi Aiyangar and *M. G. Kuppuswami Aiyar* for the Appellants.

P. Nagabhushanam for the Respondents.

The Court delivered the following

Judgments :—*The Offg. Chief Justice* :—The question argued in this appeal is whether in a suit under S. 92 of the Code of Civil Procedure for the removal of a trustee and the settlement of a scheme, the District Judge was right in dismissing the suit with costs as regards the 3rd and 4th defendants who had been joined by the plaintiffs on the ground that the lease granted to them by the trustees of the charity, defendants Nos. 1 and 2, was a breach of trust. It is well settled that in a suit under S. 92, a decree for possession could not be given against persons in the position of defendants Nos. 3 and 4, and it seems to follow that the contention of the appellants that a mere declaration might be given against them is unsustainable, as, if any relief could properly be given against them in such a suit. There is no reason why it should be limited to a mere declaration and should not award possession as well. The question then is whether they were properly made parties by the plaintiffs as no

* A. S No. 121 of 1911. 7th August 1914.

Raghavalu Chetty v. Pellati Sitamma.

Wallis, Offg. C.J.

reliefs were obtainable against them. The decisions in *Ghazaffar Husain Khan* v. *Yawar Husain*, [1] and in *Collector of Poona* v. *Bai Chanchal Bai*, [2] were cited on one side and the Calcutta decision in *Budh Singh Dudhuria* v. *Niradbaran Roy* [3] on the other. It seems to me that the view of Mookerji J. in *Budh Singh Dudhuria* v. *Niradbaran Roy* [3] is right and that these defendants have been wrongly impleaded. If they had desired to be made parties I agree that an order adding them might properly have been made. (*cf. Attorney-General* v. *Pretyman* [4]) but I do not think they ought to be made parties against their will to a suit under S. 92 which may involve a great variety of other matters and cannot, to borrow the language of O. 1, R. 10 (2) of the Code of Civil Procedure effectually and completely adjudicate upon and settle their rights. The case is very different from suits for partition in which according to the settled practice of this Court, it is usual to make the alienees of joint family property parties when the alienation is questioned. In such a case the Court completely adjudicates on and settles the whole matter. Here it is precluded from doing so. I would dismiss the appeal with costs.

Seshagiri Aiyar, J:—Two worshippers sued under S. 92 of the Code of Civil Procedure for the removal of defendants 1 and 2, from the trusteeship of the plaint temple, for the settlement of a scheme and for other consequential reliefs. The main allegation against them was that they improperly granted a lease of the temple properties to defendants 3 and 4 for a low rent and for an unconscionably long period. The District Judge found that defendants 1 and 2 committed serious breaches of trust during their management and directed their removal; he gave directions for the appointment of new trustees; and declared that the suit against defendants 3 and 4 should be dismissed with costs.

Plaintiffs have appealed. It was argued by Mr. M. O. Parthasarathy Aiyangar that on the finding of the District Judge that the leases in favour of the 3rd and 4th defendants were not binding on the temple, he ought to have directed possession to be given to the plaintiffs on behalf of the temple. The decisions of all the High Courts are against giving possession to any but

1. (1905) I. L. R. 28 A 112. 2. (1911) I. L. R. 35 B 470.
3. (1905) 2 C. L. J. 431. 4. (1845) 8 Beav. 316 S. C. 50 E. R. 124.

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Seshagiri Aiyar, J.

the lawful trustees and against ejecting persons in possession in a suit under S. 92. The learned counsel argues that even if possession cannot be given, there should be a declaration embodied in the decree that the lease is not binding on the trust so that the question may not be raised again by defendants 1 and 2: I was at first inclined to think that this relief may be given by the decree under Cl. (h) of S. 92 and I had in mind the observation of the learned Judges in *Miyaji* alias *Mahomed Ghouse Sahib* v. *Sheik Ahmed Sahib* [1], to the effect "that the question to whom the possession is to be transferred is an incident of the declaration that the defendant is removed from the trusteeship." On closely examining that case, I find that one of the plaintiffs was a lawful trustee and that possession was directed to be given to him by the defaulting trustee. Moreover the pronouncement of the learned Judges was under Act XX of 1863 and not under the Code of Civil Procedure. I think Mr. P. Nagabushanam is right in his contention that a declaration against defendants 3 and 4 must stand on the same footing as a direction to give possession. I therefore hold that plaintiffs are not entitled to the declaration.

There remains the further question whether the Judge was right in holding that the suit against defendants 3 and 4 should be dismissed. This amounts to saying that they were not proper parties to a suit of this description. There has been a conflict of views upon this question. I shall first examine the provisions of the Code before dealing with the case law. Suits of every description are controlled as regards the array of parties by Orders I and II. The fact that S. 92 provides for a particular class of litigation will not take it away from the purview of these orders. Order 1, Rule 10, Sub-clause 2, gives to the Court and to the party ample powers in this behalf. "The name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added." If the plaintiffs could have moved the Court under this Order to make the defendants 3 and 4 parties, I can see no objection on principle to their having impleaded them at the

1. (1908) I.L.R. 31 M. 212 at p. 214.

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Seshagiri Aiyar J.

outset. To my mind a more reasonable application of this rule cannot be had than by impleading persons in whose favour the defaulting trustee conveyed properties as defendants. It is said that he can be examined in the case as a witness. That will not enable the Court to give a proper decision. His witness also should be examined, and the arguments of his pleader should be heard, if a right conclusion is to be arrived at. It may and does very often happen that the trustee after having alienated properties to others feels no interest in upholding his alienation; he may not choose to examine any witness. Moreover, the non-intervention of the alienee may result in a conflict of decisions. In the suit under S. 92, the trustee may be removed on the ground that he has made an improper alienation; and in a suit to recover possession, after hearing the alienee, it may be found that the alienation was binding on the trust. It is not necessary to avoid this possible conflict to hold that the decision under S. 92 will be *res judicata* in the subsequent litigation. I express no opinion on the question. But certainly the judgment in the scheme suit will be one *inter partes*, if the alienee is held to be a proper party and will be very strong evidence against him in the subsequent litigation. I am therefore of opinion that the proper course to adopt in cases where the alienation by a trustee is in question is to implead the person in whose favour the alienation was made and to decide the case in his presence. Even if he is not a necessary party, I have no hesitation in holding that he is a proper party. This view is supported by the observations of Sir John Stanley C.J. in *Gazaffar Husain Khan* v. *Yawar Husain* [1] by the decision of the Bombay High Court in *Collector of Poona* v. *Bai Chanchal Bai* [2] and by that of the Calcutta High Court in *Sajedur Raja Chowdhuri* v. *Gour Mohun Das Baishnav* [3]. Mr. Justice Mookerji in a later case in *Budh Singh Dadhuria* v. *Naradbaran Roy* [4], holds that alienees who have an interest adverse to the trust are not proper parties; and dissents from the view taken in *Sajedur Raja Chowdhuri* v. *Gour Mohun Das Baishnav* [3]. The learned Judge for whose opinion I have the highest respect has not considered the effect of O. 1., R.10; and I find that Mr. Justice Harrington who took part in the decision does not say

1. (1905) I.L.R. 28 A 112.
2. (1911) I.L.R. 35 B 470
3. (1897) I.L.R. 24 C 418.
4. (1905) 2 C. L. J. 431.

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that the alienees are not proper parties. The balance of authority therefore, is in favour of the view I take. I have already said that in the interests of justice and with a view to avoid a conflict of decisions, the alienee must be a party. For all these reasons I am of opinion that that portion of the decree of the District Judge which directs dismissal of the suit against defendants 3 and 4 should be set aside. I will make no order as to costs either here or in the Court below.

The Court:—As there is a difference of opinion the decree of the Lower Courts stands and this appeal must be dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

Noor Muhammad Sahib and others. ... *Appellants** (*Plaintiffs*).

v.

Karim Bibi Ammal and others. ... *Respondents* 1 to 104 (*Defendants.*)

Muhammad Sahib v. Karim Bibi Ammal.

Religious endowments—Muhammadan Law—Right of suit—Worshippers suit by, for possession—Mosque.

The worshippers of a Mosque cannot whether in their individual or in their collective capacity maintain a suit for possession of the properties belonging to the Mosque.

Kamaraju v. *Asanali Sheriff* (1) followed.

Second Appeal from the decree of the District Court of South Arcot in A. S. No. 261 of 1909 preferred against the decree of the Court of the District Munsif of Chidambaram in O. S. No. 381 of 1908.

Plaintiffs are two of the members of the Muhammadan community residing at a village in South Arcot and they institute the present suit on behalf of the said community to redeem a mortgage over certain lands alleging that they were the property of a mosque in which the said community was interested. Various defences had been raised, the chief of them being that plaintiffs as mere worshippers were not entitled to sue for recovery of possession of any property belonging to the mosque and that a previous consent decree between the then managers of the mosque and the 2nd defendant who was in possession of the plaint

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* S. A. 1476 of 1910. 28th July, 1914.

1. (1899) I. L. R. 23 M. 99.

properties was binding on the mosque and the present suit was therefore barred. Muhammad Sahib v. Karim Bibi Ammal.

The District Munsif dismissed the suit upholding both the contentions of the defendants.

The District Judge in appeal held that the suit as framed was not maintainable and that plaintiffs as mere worshippers had no interest in the property of the mosque and did not belong to any of the class of persons entitled to redeem within the meaning of S. 91 of the Transfer of Property Act. Hence the Second Appeal.

M. Krishnamachariar for the Appellants.

T. Rangachariar, T. Narsimha Aiyangar and *C. Padmanabha Aiyangar* for the Respondents.

The Court delivered the following

Judgment :—The Lower Courts seem to have rightly held that a suit for possession of the mosque properties could not be maintained by the worshippers in their individual or collective capacity as that principle of law seems to be derivable from the observations in *Srinivasa Aiyangar* v. *Srinivasa Swami* [1], *Kamaraju* v. *Asanali Sheriff* [2] and *Dasandhay* v. *Muhammad Abu Nasar* [3].

The plaintiffs have not established that by Muhammadan Law the worshippers as a body can be collective muttawallees of the plaint Mosque and we are further unable to hold that the suit is brought by the plaintiffs in this case as trustees and not as merely belonging to and representing the community of worshippers. We dismiss the second appeal with costs.

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1. (1892) I. L. R. 16 M. 31
2. (1899) I. L. R. 23 M. 99.
3. (1911) I. L. R. 33 A. 660.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

Thangavelu Pillai ... *Appellant** (*Plaintiff*). In S. A. No. 1512 of 1912.

Purshottam Reddi ... *Appellant†* (*Plaintiff*). In S. A. No. 2229 of 1912.

v.

Doraisami Pillai and another ... *Respondents* (*Defendant*) (*in both*).

Thangavelu Pillai *v.* Doraisami Pillai.

Hindu Law—Gift by father of interest in family property to only son—Validity of—Natural love and affection—Relinquishment—Consideration, necessity for.

A gift by a father of all his interest in the family property in favour of his only son being supported by natural love and affection can be upheld as a relinquishment.

A relinquishment to be effective need not necessarily be supported by consideration nor need it to be in favour of all the remaining coparceners.

Second Appeals from the decrees of the District Court of South Arcot in A. S. Nos. 176 and 175 of 1911 respectively preferred against the decrees of the Court of the District Munsif of Villipuram in O.S. Nos. 401 and 410 of 1909.

T. R. Ramachandra Aiyar and *A. S. Venku Aiyar* for Appellants.

R. Subramania Aiyar for Respondents.

The Court delivered the following

Judgment: *Sadasiva Aiyar J*:—The plaintiff is the appellant in both these appeals. The suit out of which Second Appeal No. 2229 arose was brought on a mortgage document executed in the plaintiff's favour by the defendants 1and 2 on the 13th February 1905. The 2nd defendant is the son of 1st defendant. The lower appellate Court finds (a) that the 2nd defendant was a minor when the 1st defendant induced him to join the 1st defendant in executing the mortgage document; (b) that the mortgaged property belonged solely to the son, the 2nd defendant, on the date of the mortgage deed in 1905 as it had been gifted away by the father, the 1st defendant to the 2nd defendant under the registered gift-deed, Exhibit IV, dated 1892; and (c) that the money which formed the consideration for the mortgage Exhibit A was not borrowed for the benefit of the 2nd defendant.

* S. A. No. 1512 & 2229 of 1912. † 10th August 1914.

Thangavelu Pillai v. Doraisami Pillai.

Sadasiva Aiyar J.

On these findings the plaintiff's suit was dismissed with the 2nd defendant's costs so far as it prayed for the sale of the mortgaged property though there was a personal decree passed against the 1st defendant.

The only contention argued in this second appeal is that the gift-deed, dated 1892 by the 1st defendant to the 2nd defendant was not legally effective to transfer the 1st defendant's undivided half share in the plaint properties to his only son, the 2nd defendant, and that therefore the mortgage under Ex. A affected at least the 1st defendant's said undivided half share and that a decree ought to have been passed by the lower Courts for the sale of the said moiety. One of the grounds on which the gift-deed is attacked is that the gift was not accepted by anybody on behalf of the 2nd defendant. The District Judge clearly finds that the defendant's witness No. 2 accepted the deed on behalf of the 2nd defendant and that he subsequently handed the document over to the 2nd defendant's mother. This finding is supported by the evidence of the said 2nd witness which proves that he acted as the agent of the 2nd defendant's mother and received the gift-deed from the 1st defendant on her behalf. This indicates her acceptance of the gift-deed on behalf of the 2nd defendant. The only other ground on which the gift-deed is attacked is that, under the Hindu Law, an undivided co-parcener cannot validly make a gift of his share in the property so as to be binding even on himself. For this proposition reliance is placed on certain observations in *Appa* v. *Ranga* 1. In that case it was held on the facts appearing therein that plaintiff, a member of an undivided Hindu family, got no consideration *for the agreement* by which he relinquished his rights in the family property in favour of the remaining co-parceners, that his release therefore having been by an agreement without consideration was not binding upon him and that he was, notwithstanding the agreement, entitled to sue for his share in the family properties. Thus the decision turned on the sole ground that there was no consideration for the relinquishment agreement relied upon by the defence. In that same case, it is observed that if the relinquishment was in favour of persons who stood in such a relationship with the

1. (1882) I. L. R. 6 M 71.

Thangavelu Pillai v. Doraisami Pillai.

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executant that natural love and affection was evidently the motive of the transaction. (See S. 25 of the Contract Act) the relinquishment would be valid. The learned Judges in that particular case held however that the terms of the document clearly showed that natural love and affection was not the motive for the relinquishment and that therefore there was not even the consideration of natural love and affection and hence, the agreement was not valid. In the present case, the gift is made by a father to his only son and the circumstances clearly show that if the gift deed is treated as an agreement by which the father relinquished his rights in favour of his son, it would be a valid agreement supported by the consideration of natural love. It was then argued that the case in *Appa* v. *Ranga* [1] was really decided on the ground that a co-parcener cannot relinquish his share unless something trifling at least, was given to him as consideration. Having carefully read that judgment I do not find that the learned Judges expressed any such view. They only refer to the contention of the respondent in that case that there could be no valid partition of the property without such a trifling present because the law as laid down in Manu requires that even a co-parcener who does not desire to take a share must have something given him at the time of the partition and then the learned Judges refer to the reply of the appellant to this contention put forward on behalf of the respondents. The learned Judges nowhere state that they accept the said contention of the respondent. In *Peddayya* v. *Ramalingam*, [2] it has been held that a co-parcener cannot only relinquish his share in favour of all the remaining co-parceners as a body but he can do it in favour of even one of the several remaining co-parceners. The texts of Manu and Yagnavalkya which refer to the giving of some trifle to the person who so relinquished his share were not considered as making the receipt of such trifle as a condition precedent to the validity of such relinquishment. In that case, two out of four co-parceners gave up their interest in favour of one of the remaining two co-parceners, merely in order to give effect to what they believed to be the wishes of their father and *Muthusami Aiyar and Shephard JJ.* held that such a relinquishment was perfectly valid following the decision in an unreported case

1. (1882) I. L. R. 6 M 71. 2. (1888) I. L. R. 11 M 406.

Thangavelu Pillai v. Doraisami Pillai. — Sadasiva Aiyar J.

(Regular Appeal No. 58 of 1884) where a gift made by an undivided son, in fulfilment of a natural obligation founded upon the consent of the father to the severance of the alienor's interest in the co-parcenary was upheld. The reference in the texts to the giving of a trifle to the relinquishing co-parcener must be treated rather as an antiquated formality which was prescribed as conclusive evidence of the deliberate and final character of the relinquishment than as forming an indispensable condition to the validity of such a relinquishment.

It is only a transfer to a stranger of natural rights which carry with them obligations to third parties that could not be assigned under the law, but every man is perfectly entitled to waive or release any rights in property belonging to himself. I do not think that there is anything in the judgment in the case *Appa* v. *Ranga,* [1] which throws doubt upon the existence of such a power of relinquishment and if there are any, those observations must be held to have been not followed in the later case in *Peddayya* v. *Ramalingam* [2].

Lastly, it is clear in the present case that the gift by the 1st defendant to his only son was part of an arrangement brought about by mediators to effect a division between the 1st defendant (who was squandering his ancestral property in evil ways) and his minor son the 2nd defendant. Though Ex. A is in form a gift it was really an allotment of the plaint properties for the son's share, the father taking the other properties for his share which properties on the same date were conveyed by him to a friend of his in trust to discharge his debts and to repay the balance left to himself (the father); such an arrangement is clearly binding on the 1st defendant. In the result the Second Appeal No. 2229 fails and is dismissed with costs. For similar reasons Second Appeal No. 1512 is also dismissed with costs.

Napier, J :—I concur.

1. (1882) I. L. R. 6 M 71. 2. (1888) I. L. R. 11 M 406.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Ayling and Mr. Justice Napier.

Yanamandra Papiah and others ... *Appellants** (*Ctr. Petrs. Plaintiffs 2 to 8*).
v.
Lanka Subbasastrulu ... *Respondent* (*Petitioner 3rd Defendant*).

Yanamandra Papiah v. Lanka Subbasastrulu.

Hindu Law—Debts—Liability of sons—Suit against father and sons—Decree for mesne profits against father alone—Executability against sons' shares—C.P.C. S. 11.

Where in a suit for possession and for mesne profits against a Hindu father and his sons, a decree for possession was given against all but there was a decree for mesne profits only against the father and in execution the decree-holder attached the entire family properties.

Held that the debt not being one which the sons were not liable to pay under the Hindu Law, their interests also could be proceeded against and the fact that their primary liability had been negatived in the suit, did not preclude the Court from giving effect to their Hindu Law liability by executing the decree against their shares in the family property.

Shiam Lal v. *Ganesh Lal* (1) followed.

Appeal from the order of the Temporary Subordinate Judge's Court of Nellore, dated the 3rd July 1913 in A.S.No. 129 of 1912 preferred against the order of the Court of the District Munsif of Kanigiri, dated 19th August 1912, in C.M.P. No. 820 of 1912 (in O.S. No. 96 of 1909).

S. Subramania Iyer for Appellant.

T. Prakasam and *P. Chenchayya* for Respondent.

The Court delivered the following

Judgment:—This is an appeal from the Appellate order of the Temporary Subordinate Judge of Nellore passed on appeal from an order of the District Munsif of Kanigiri on a petition filed by the 3rd defendant in execution proceedings in O. S. No. 96 of 1909 on the file of his Court. The third defendant is the son of the first defendant in the suit. The suit was against the father, the present petitioner and others for a declaration of the plaintiff's right to certain items of immoveable property, for recovery of possession of the same from them and for mesne profits. By the decree passed on the 22nd December 1910 all the defendants were ordered to put the plaintiffs in possession of certain items of the suit property and the first defendant was also directed to pay Rs. 370 for mesne profits and costs on the mesne profits. In execution of the decree against the first defendant for mesne

*A. A. A. O. No. 78 of 1913. 24th July 1914.

1. (1906) I. L. R. 28 All 288.

Yanamandra Papiah v. Lanka Subbasastrulu.

profits and costs the entire house belonging to the first and third defendants was attached and the third defendant claimed in the petition under appeal that his undivided half share was not liable to attachment on the ground that the decree for mesne profits and costs was limited against the first defendant, his father. The District Munsif held that his share was liable to be taken in execution for his father's debts, they not being tainted by any illegality or immorality. The Temporary Subordinate Judge on appeal was of opinion that, although the primary liability of the third defendant to pay such debts undoubtedly existed, yet, as he had been a party to the suit and no decree had been passed against him, the decree was final as regards his liability and was a bar to the plaintiffs' claim. It is contended before us that this view is correct and reliance is placed on S. 11 explanation V of the Civil Procedure Code in that relief was claimed against the petitioner and not being granted should be deemed to be refused. We are of opinion that this plea is bad. The liability which was sought to be enforced in the suit was a suggested primary liability of the third defendant to the plaintiffs and this liability was negatived. The liability under which the plaintiffs are entitled to take the share of the third defendant in execution is the liability of a son to pay his father's debts to the extent of his share in the family property based on religious and moral considerations which are fundamental in Hindu Law and well recognised by the Courts. It is from his duty to his father that the right of the creditor springs and not from any decree against the son personally. This is made clear by the Privy Council in the leading case of *Suraj Bunsi Koer* v. *Sheo Persad Singh* [1], following an earlier decision of the board in *Muddun Thakoor* v. *Kantoo Lall* [2]. On pages 170 and 171 their Lordships make clear the position. One quotation is sufficient; "Where joint ancestral property has passed out of a joint family, under a sale in execution of a decree for the father's debt, his sons, by reason of their *duty* to pay their father's debts, cannot recover that property, unless they show that the debts were contracted for immoral purposes." There is no suggestion here that the fact of the primary liability of the sons having been negatived in a suit makes any difference; and on

1. (1879) I. L. R. 5 C 148. 2. (1874) L. R. 1 I. A 321 at 338.

Yanamandra Papiah v. Lanka Subbasastrulu.

principle it is clear that this cannot be so. The error that the Subordinate Judge has fallen into is in thinking that the liability of a son arises out of some direct liability to a creditor. Such liability may exist and a suit may be brought to enforce it. But the fact that in a suit against the son such primary liability is negatived does not affect his liability arising out of his duty towards his father. This view has been taken by the High Court of Allahabad in *Shiam Lal* v. *Ganesh Lal* [1]. In that case the suit had been brought against a father and son on a promissory note and was dismissed against the son as he was no party to it. In a subsequent suit, by the son for a declaration that the decree obtained against the father could not be executed against his interest in the family property in view of the fact that the suit had been dismissed against him the defence was held bad. Tht Court held that the original suit left the son exactly in the position in which he would have been if he had never been impleaded at all. We are in entire concurrence with this view.

The result will be that the order of the lower appellate Court is set aside and the order of the District Munsif dismissing the claim petitions restored. The counter-petitioners will have their costs in this Court and the lower appellate Court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Sir John Edward Power Wallis Officiating Chief Justice and Mr. Justice Kumaraswami Sastry.

Sri Meerja Raja Sri Poospati Vijiarama Gajapathi Raja Maharaj Manya Sultan Bahadur of Vizianagaram ... *Appellant** (*Plaintiff*).

v.

The Collector of Vizagapatam and others...*Respondents* (*Defendants*).

Rajah of Vizianagaram v. Collector of Vizagapatam.

Madras Act I of 1876—Regulation XXV of 1802—Grant by Zamindar—Subject to payment—Permanent lease—Lessee not owner within the meaning of—Separate Registration—Liability for.

1. (1906) I. L. R. 28 A 288.

* A. S. No 224 of 1909. 20th July 1914.

Rajah. o Vizia-f nagaram *v.* Collector of Vizagapatam.

A permanent lessee is not a transferee of proprietorship or owner within the meaning of Regulation XXV of 1802 or Act I of 1876 which is supplementary to the Regulation and is to be read with reference to it, so as to render the lands included in the lease liable to be separately registered.

Where a mokhasa tenure was resumed by the zamindar and the lands were re-granted subject to fixed annual payment.

Held that the grant was in the nature of a permanent lease and the grantee was not liable to have the lands separately registered in his name.

Appeal from the decree of the Court of the Temporary Subordinate Judge of Vizagapatam in O. S. No. 34 of 1906.

This is a suit for a declaration that action villages granted by the predecessors in title of the defendants ought to be separately registered in the names of the defendants.

S. Srinivasa Aiyangar and K. V. Krishnaswami Aiyar for the Appellant.

The Government Pleader for the 1st Respondent.

B. N. Sarma for 36th Respondent.

V. Ramadas and S. Duraisami Aiyar for Respondents.

The Court delivered the following

Judgment :—We think the Subordinate Judge in this case was right. The first question relates to the nature of the interest at present enjoyed by the defendants. By a deed dated the 1st June 1808 the predecessor of the present plaintiff granted a mokhasa patta to three individuals of three villages without reserving any rent.

There is no doubt and it has been so held in some cases in this court that such tenures were formerly believed to be resumable on the death of the grantor. On the death of the grantor in this case when the estate came under the management of the Collector as Manager in 1845 these villages were resumed. That is to say, the villages were attached or kept under *zuft* and the profits of the villages were enjoyed apparently by the Zamindar for some years. Then in the year 1853 a petition was put in Exhibit B, stating that the villages had been granted on service tenure to the ancestors of the petitioners and that the Zamindar had been pleased to release them from attachment "to be enjoyed by us nine sons of the aforesaid Vijia Gopalaraju (one of the grantees) I agree to pay a kattubadi of Rs. 300 a year newly fixed."

Then Exhibit C is an order of the Zamindar giving effect to this arrangement and Exhibit D is a further order addressed to

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the office Amin and it says "Inasmuch as the said villages were not formerly charged with Kattubadi and as Seetaramaraju one of the sons of Vijia Gopala Raju (that is to say, one of the original grantees), presented a sannad to us stating that nine sons of late Kakerlapudi Vijia Gopala Raja would pay the Kattubadi of Rs. 300 every year from the current fasli year 1263 and enjoy the same as before and act in obedience to the orders of the circar, the said three villages should be released from attachment and given to the nine persons of the family to be enjoyed by all the members of the said family." Now the three villages have been enjoyed for the past sixty years subject to the payment of this kattubadi without any question being raised about it and you must take it, that the tenure on which they held is that they should hold the land subject to an annual payment of this kattubadi of Rs. 300, and that in effect there was a re-grant of the three villages in 1853.

Those are the terms of the tenure with which we have to deal. Subsequently some years ago the Zamindar sought to resume these villages and instituted a suit for that purpose, which was dismissed. He is now seeking to take advantage of Act I of 1876 for the purpose of getting these three villages separately registered in the names of the descendants of the grantees, and having a proportionate *peish-cush* or Government revenue charged upon them,—thus entirely altering the terms upon which they had been held for so many years by the grantees, which terms are: that they should enjoy the villages on a payment of Rs. 300 Kattubadi annually leaving the Zamindars to pay the proportionate *peish-cush* which, as the mere fact of the institution of this suit shows, is probably a considerably a larger sum. Now there are, it is not denied, very numerous other villages in the Northern Circars and possibly elsewhere which are held on similar tenures and in which a similar operation might be attempted if the law allowed it. Therefore the question is one of considerable general importance, as to whether grantees holding on perpetual grants subject to the payment of a small rent under the name of *Jodi kattubadi* or *porupu* are liable to have their lands separately registered under this Act and separate assessment imposed upon them. Now the history of the question is this. Regulation 25 of 1802 provided that proprietors of land should be at liberty to transfer

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without the consent of Government, and such transfer should be valid, but that "unless such sale, gift or transfer shall have been regularly registered at the office of the Collector and unless the public assessment shall have been previously determined and fixed on such separated portions of land by the Collector, such sale, gift or transfer shall be of no legal force or effect, nor shall such transactions exempt a Zamindar from the payment of any part of the public land tax assessed on the entire Zamindari previously to such transfer, but the whole Zamindari shall continue to be answerable for the total land tax, in the same manner as if no such transaction had occurred". Notwithstanding the generality of the language of the latter part of this section, it has been held by the Privy Council in the Ettiyapuram case *Venkateswara Yettiyappa Naicker* v. *Alagu Moothoo Servagaran* [1] and elsewhere that this section does not affect the validity of transfers as between the parties but only saves the rights of Government. The regulation also provided for the manner in which the proportionate assessment was to be fixed and in Regulation 26 there was a provision as to the separate registration of the portions of settled estates which had been alienated in a Court sale. So far as I know there was no specific legislative provision as to how separate registration was to be enforced in other cases, though no doubt the right to such separate registration was recognised in certain cases. In that state of things Act I of 1876 was passed. It is described as "An Act to make better provision for the separate assessment of alienated portions of permanently settled estates" and it says "whereas it is desirable to make better provision for the separate assessment to land revenue of portions of permanently settled estates alienated by sale or otherwise, it is hereby enacted as follows:—

1. The alienor or alienee of any portion of a permanently settled estate, or the representative of any such alienor or alienee, may apply to the Collector of the District in which such portion is situate for its registration in the name of the alienee and for its separate assessment in respect of land revenue.

2. The Collector shall thereupon hold an enquiry as to who is the present owner of the property in respect of which the application is made.

1. (1861) 8 M. I. A. 327.

Raja of Vizianagaram v. Collector of Vizagapatam.

So that what the Collector has to do is to find out who is the present owner, and the intention of the legislature is that it should be only where there has been a change of ownership that separate registration and assessment should take place. Now the question is whether there can be said to have been a change of ownership by virtue of this grant of these three villages to the grantees subject to a reserved payment of kattubadi or favourable rent of Rs. 300. Assuming that the grant was a permanent one and was not liable to resumption, we do not think that it can stand on any higher footing than a permanent lease. It is a grant subject to a reservation of annual money payment or rent and therefore it seems to us to be of the character of a permanent lease. Now there is no authority for saying that a permanent lessee is included in the meaning of the term "owner" and if it had been intended to include such a person within the term "owner" we think there would have been a definition clause including him. Numerous authorities may be cited in support of this view. It was expressly held by the Privy Council that a permanent lease by a *Zamindar* is not a transfer of his proprietary right within the meaning of S. 8 of Regulation 25 of 1802 in the case *Venkateswara Yettiappah Naicker* v. *Alagoo Moothoo Servagaren* [1], where their Lordships observe "this is not an alienation of the *Zamindary* or any part of it. It is a perpetual lease of a distinct portion of a *Zamindary*, which constituted a distinct portion before the appellant's title to the zamindary accrued, and such an estate could not, without great violence to the language be considered as a transfer within the words of the Regulation." The reference is to S. 8 of Regulation 25 of 1802 which deals with the transfer by proprietors of their proprietary right, and is therefore express authority for the proposition that a perpetual lease is not a transfer of proprietary right or ownership and does not constitute the lessee, the proprietor or owner within the meaning of Regulation 25 of 1802. As already pointed out Act I of 1876 is supplementary to Regulation 25 of 1802 which must be read with reference to it. The same view has been taken in

1. (1861) 8 M. I. A. 327 at 338.

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Kshetrabarobissoyi v. *Sobhanapuram Harikristna Naidu* [1], with regard to the language of Act III of 1895, S. 5.

There the learned Judges say, " The question then remains whether the grant of a permanent lease is a transfer of ownership" and, following the ruling of the Privy Council which we have just referred to the learned Judges held that a permanent lease is not a transfer of the proprietory right or ownership. We may refer also to two recent decisions of the Privy Council one *Hari Narayan Singh* v. *Sriram Chakravarthi* [2] and another *Durga Prasad Singh* v. *Brajanath Bose* [3], in which it was held that a permanent grant at a favourable rent of the nature of the kattubadi reserved in this case, was not a transfer of ownership so as to deprive the grantor of his mining rights in the land which are incidental to his character of owner. And in the first case, 37 Indian Appeals 136, his right is distinctly based upon his possessing the character of owner. The Subordinate Judge has quoted various authorities to the same effect in his judgment; Markby in his Elements of Law (5th Edition) observes, " however numerous and extensive may be the detached rights, however insignificant may be the residue, it is the holder of this residue of right whom we always consider as the owner." The decision of the Privy Council in *Robert Fischer* v. *The Secretary of State for India in Council*[4] does not affect the present case, because there what was contemplated from the first was an out and out gift of the village to Mr. Fischer to be separately registered and according to the construction put upon the various documents their Lordships came to the conclusion that the *peish-cush* or *poruppu* as it was called in different documents, was only intended to be a temporary payment to the Zamindar pending the separate registration and assessment which was contemplated from the very first. With regard to the case in *Kamalammal* v. *Raju Naicker* [5] and the observations there cited we may point out that that was a case of gift and obviously where there is a case of gift, that is, a case of out and out-alienatation, and the donee becomes the owner. But those cases are quite different from

1. (1909) I. L. R., 33 M. 340. 2. (1911) L. R. 37 I. A. 136.
3. (1913) L. R. 39 I. A. 133. S. C. 23 M. L. J. 26.
4. (1898) I. L. R. 22 M. 270 (P. C.) 5. (1896) I. L. R. 19 M. 308.

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the present case which is, in our opinion merely that of a permanent lease at a favourable rent. We think that it be would be giving an extension which was never intended and which would be of very dangerous consequence to the Act I of 1876 if we were to hold that the creation of a perpetual lease at a favourable rent rendered the lessee the owner so as to subject him to the liability of having the land included in the lease separately registered and separately assessed. We may also add that a decision to the same effect has already been given by this Court in an unreported case by Mr. Justice Miller and Justice Munro (Appeal 141 of 1908.)

In the result the appeal fails and is dismissed with costs. No order as to costs of the Secretary of State.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Ayling and Mr. Justice Tyabji.

Bhimavarapu Buchi Reddi and others ... *Appellants* * (*Defendants 1 to 5*)

v.

The President of the Taluk Board of Guntur and another ... *Respondents* (*Plaintiffs*).

Buchi Reddi v. President of the Taluk Board of Guntur.

Madras Local Boards Act, S. 51—Right of suit—Local Boards—Trust—Powers transferred by Board of Revenue—Scope of—Management as well as superintendence—Suit for recovery of trust property—Maintainability of.

The local body to which the powers of the Board of Revenue in respect of a trust are transferred under S. 51 of the Local Boards Act, is invested with the rights of management as well as superintendence and in the absence of trustees entitled to sue, may maintain a suit for the recovery of the trust property.

The Municipal Council of Rajahmundry v. *Susarla Venkateswarulu Chairman* (1) followed.

Second appeal from the decree of the Court of the Temporary Subordinate Judge of Guntur in appeal suit No. 492 of 1910 preferred against the decree of the Court of the District Munsif of Tenali in Original Suit No. 701 of 1908.

P. Nagabushanam for the Appellants.

P. Narayanamurti for the 2nd Respondent.

The Court delivered the following

Judgment :—The first point argued on behalf of the appellants is that the 2nd respondent was invested only with the power of superintendence originally possessed by the Board of Revenue

* S. A. No. 1481 of 1912. 29th July 1914.

1. (1907) I. L. R. 31 M. 111.

Buchi Reddi v. President of the Taluk Board of Guntur.

under Regulation VII of 1817, and was not entitled to bring this suit. S. 51 of the Local Board's Act, V of 1884, is identical with S. 26 of the District Municipalities Act IV of 1884 and the ruling in *The Chairman, Municipal Council of Rajahmundry* v. *Susurla Venkateswaralu* [1] is clear authority for the proposition that the local body to which the powers of the Board of Revenue were transferred was invested with the rights of management as well as superintendence and that the former include the right to sue for the recovery of trust property. It is suggested that even the Board cannot sue over the heads of trustees but we consider that Ex. C. is a valid resignation of their posts by such trustees, as held office at the date of its execution and it is not suggested that any other trustees had come into office prior to the date of suit. We must hold that the 2nd plaintiff was entitled to sue.

It is next argued that the suit is time barred. It is brought against appellants as legal representatives of B. Chenna Reddy one of the Original trustees and S. 10, Limitation Act, is applicable.

The last point sought to be raised is that defendants 2 to 5 should not be held liable; but the judgment of the Subordinate Judge shows that this was given up in the Lower Appellate Court, and we cannot allow it to be set up again here. The second appeal is dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Mr. Justice Sadasiva Iyer and Mr. Justice Tyabji.

Thayammal and another ... *Appellants* *
(*3rd & 4th Defts.*)

v.

Kuppanna Koundan ... *Respondent*
(*Plaintiff.*)

Thayammal v. Kuppanna Koundan.

Hindu Law—Guardianship—Natural Guardian—Whether paternal aunt is—Limitation Act, Art. 44—De facto *guardian—Alienations by.*

Per Sadasiva Aiyar, J. Under the Hindu Law nobody else than the father and mother of a minor (with probable exceptions in favour of the elder brother and the direct male and female ancestors of the minor) is entitled as a matter of natural right to be and to act as guardian of a minor's person and properties. *Kristo Kishor Neoghey* v. *Kader Moye Dossee* (2) *Mussamut Bhikno Koer* v. *Nut Khamelu Koer* (3) followed.

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* S. A. No. 2497 of 1912. 17th July 1914.

1. (1907) I. L. R. 31 M.111. 2. (1878) 2 C. L. R. 583.
3. (1897) 2 C. W. N. 191.

Thayammal v. Kuppanna Koundan.

The paternal aunt is not a natural guardian of a minor under the Hindu Law. Art. 44 of the Limitation Act does not apply to alienations by unauthorised guardians. *Mata Din* v. *Ahmed Ali* (1) followed.

Per curiam, An alienation by a *de facto* guardian need not be set aside when it is shown to be for no necessity at all.

Second Appeal from the decree of the Court of the Subordinate Judge of Coimbatore in A. S. No. 174 of 1911, preferred against the decree of the Court of the District Munsif of Udumalpet.

The facts are shortly these. The second appeal arose out of O. S. 131 of 1910 on the file of the District Munsif's Court of Udumalpet instituted for setting aside of 2 sales of the plaintiff's property during his minority. The 1st sale was executed by the plaintiff's mother as his guardian on the 27th June 1895, and the 2nd was executed on 26th May 1899 by the father's sister of the plaintiff who was alleged to be the *de facto* guardian of the then minor plaintiff after the demise of his mother. At the date of the 2nd alienation the father's brother's widow was the only near relation living. The Munsif found that there was no necessity for the sale nor any benefit therefrom to the minor but that the suits were barred under Art. 44 of the Limitation Act. On appeal by the plaintiff the Subordinate Judge held that the suit, as regards the 1st alienation made by the mother as guardian was barred by limitation, that there was no benefit to the minor or necessity for the said alienation and that the 2nd sale having been made by the father's sister an unauthorised person would not bind the minor and gave a decree to the plaintiff for the lands covered by the 2nd sale though the decree inadvertently included all the properties as having been decreed to the plaintiff. The contending defendants 3 and 4 preferred this second appeal.

T. Ramachandra Rao for Appellants.

T. M. Krishnaswami Aiyar and A. Anantharama Aiyar for Respondents.

T. Ramachandra Rao for the appellant contended that the suit as regards the 2nd alienation ought to have been held to have been barred by Art. 44. The decision in *Sham Chandra*

1. (1911) I. L. R. 34 A. 213.

Thayammal v. Kuppanna Koundan.

Dafadar v. *Gadadhar Mandal* [1], shows that alienation by *de facto* guardians are also governed by Art. 44. If an alienation by the mother is governed by Art. 44 there is no reason why an alienation by the father's sister should stand on a different footing.

In *Mohanund Mundul* v. *Nafur Mundul* [2], the grandmother was regarded as a natural guardian and a sale by her was held binding on the minor. In the absence of the mother the nearest relation becomes the guardian. Treveleyan, pp. 208, 209. The father's sister occupies the same position as a grandmother in the absence of a nearer relation. The decisions in *Mata Din* v. *Ahmad Ali* [3], and the other cases cited by the Subordinate Judge are all cases governed by the Muhammadan Law which prohibits all except certain persons from acting as guardians of pro perty.

T. M. Krishnaswami Aiyar with *A. Anantha Rama Aiyar* for Respondents contended that the question as to whether the person who takes upon himself the duties of a guardian is authorized so to act or not must be determined by the law governing the minor, and when once that is settled the question of limitation does not depend upon the personal law of the parties. The decision of the Privy Council in *Mata Din* v. *Ahmad Ali* [3] is a direct authority for the position that Art. 44 does not apply to an alienation made by an unauthorized person.

The Hindu Law is somewhat meagre with reference to questions relating to Guardianship. Mr. Mayne states in S. 211 that it is only *kinsmen* that would be entitled to act as guardians and that only after *appointment* by the sovereign. The passage quoted from Treveleyan showing that the Sanskrit texts provide for a succession to the right of guardianship is really not based on any Sanskrit authority. It is really an extract from MacNaughten's Hindu Law, Vol. I., pp. 103, 104 and there is no authority cited for the opinion of Mr. MacNaughten in his book. This passage in MacNaughten's book would appear to have been treated by later writers as based on the authority of Hindu Texts but there is no warrant for that so far as one could see.

1. (1911) 18 C.L.J. 277. 2. (1899) I. L. R. 26 C. 820.
(3) (1911) I. L. R. 34 A. 213.

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Sadasiva Aiyar, J.

The decisions in *Kristo Kishore. Neoghey* v. *Khader Moye Dossee*[1] *Musst. Bhikno Koer* v. *Musst. Chamelu Koer* [2] Strange's Hindu Law, p. 60. *Muthuveera Chetty* v. *Batcha Chetty* [3] would seem to show that excepting probably the case of father and mother the Hindu Law does not recognise anybody else as a guardian who has not been appointed by the Court as the representative of the Crown.

The Privy Council in *Mir Sarwarajan* v. *Fakhruddin Mahomad Chowdhuri* [4], point out the difference between a manager and a guardian. The cases holding that Art. 44 would apply to an alienation by the mother are based on the footing that she is a natural guardian.

The case in *Shamchandra Dafadar* v. *Gadadhar Mandal* [5] is a case of an alienation by the mother and further the *dictum* relied on is only *obiter* and must be treated as no longer law in the face of the Privy Council decision in *Mata Din* v. *Ahamad Ali* [6].

The law recognises no class of guardians as *de facto* guardians and the Hindu law is no exception to it. The decision in *Hunoomanpershad Panday* v. *Mussumat Babooee Munraj Koonweree* [7] and the other cases that follow must be understood from the standpoint of the *bona fide* purchaser or encumbrancer but not as legalising the position of an intermeddler as the Judgment in the Privy Council would show.

T. Ramachandra Rao replied.

The Court delivered the following

Judgments :—*Sadasiva Aiyar J* :—Following *Kristo Kissor Neoghey* v. *Kader Moye Dossee*[1] and *Musst. Bhikno Koer* v. *Musst Chamelu Koer* [2] I hold that under Hindu Law, nobody-else than the father and mother of a minor (with probable exceptions in favour of the elder brother and the direct male and female ancestors of the minor) is entitled as a matter of natural right to be and to act as guardian of a minor's person and properties. Recourse must be had to the court (representing the rights of

1. (1871) 2 C. L. R. 583.
2. (1897) 2 C. W. N. 191.
3. (1911) 2 M. W. N. 561.
4. (1911) I. L. R. 39 C. 233 at 237. (P.C.)
5. (1911) 13 C. L.J. 277.
6. (1911) I. L. R. 34 A 213.
7. (1856) 6 M. I. A. 393 at 413.

the king which are paramount to even the rights of the parents, where there is no natural guardian alive.

The paternal aunt was therefore not the natural guardian of the plaintiff when she made the unauthorised alienation.

Assuming that she was the *de facto* guardian, her alienation for no necessity need not be set aside. Art. 44 of the Limitation Act does not apply to alienations by unauthorised guardians (See *Mata Din* v. *Ahmed Ali* [1] .) the Judgment of the Lower Appellate Court is right in the main but in the decretal portion, it decrees possession of the entire lands covered by Exhibit III forgetting that so far as the portions covered by Exhibit II are concerned the claim had been held to be barred by limitation.

The lower Court's decree will be modified accordingly, that is by providing that the plaintiff's suit shall be decreed only as regards the portion or fraction of the lands covered by Exhibit III which is not included in Exhibit II and it will be confirmed in other respects. The appellants will pay half of respondents costs in this Court and bear their own.

Tyabji J:—No direct authority is cited to us showing that a paternal aunt is a natural guardian (as distinguished from a testamentary guardian or a guardian appointed by Court) of a minor under the Hindu Law.

Mohanund Mondul v. *Nafur Mondul* [2] is however cited in which it is said that "it was not questioned and it would not very well be questioned" that a paternal grandmother of the minor who has acted as the manager of the minor's property "answered to the descriptions of natural guardian in this case." It is argued for the Appellants that this is a ruling that a paternal grandmother is a natural guardian and that therefore a paternal aunt may also be such and may therefore be clothed with the powers of a guardian without being appointed to do so by competent authority. It may be that the remarks just preceding the statements I have cited may require reconsideration in view of what was said by their Lordships of the Privy Council in *Mir Sarwarjan* v. *Fakhruddin Mahomed Chowdhuri* [3]. Apart from this however as my learned brother has said in his judgment (which I have had the benefit of reading) that a female

1. (1911) I. L. R. 34 A. 213. 2. (1899) I. L. R. 26 C. 820 at 825.
3. (1911) I. L. R. 39 C. 233.

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Tyabji J.

in the direct line of ascent stands in Hindu Law on a totally different footing as regards rights of guardianships from a collateral like a paternal aunt. The only other authorities cited for the appellant consists of passages from MacNaughten's Hindu Law and similar text books where it is said that paternal kinsmen have the right of guardianship. It is not quite clear whether female paternal kinsmen (not being in the direct line of ascent), are intended to be included amongst those relations, who have the 'natural' right of guardianship. Mayne in his Hindu Law (8th Edition) page 278, paragraph 211, on the other hand expressly refers to male kinsmen alone as having this right. And this view is supported by the decision in *Kristo Kissor Neoghy v. Kader Moye Dossee* [1] and by the view expressed by my learned brother in his judgment.

I therefore agree in the order proposed by my learned brother.

The memorandum of objections is allowed with costs as Exhibit III was not executed for purposes binding on the plaintiff and it is not proved that Rs. 50 (the money recovered by plaintiff's aunt) was spent for the plaintiff's benefit.

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1. (1878) 2 C. L. R. 583.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sankaran Nair and Mr. Justice Spencer.

Manikka Mudaliar and others .... *Appellants** (*Defendants*)

v.

Soubagia Ammal ... *Respondent* (*Plaintiff*)

Manikka Mudaliar *v.* Soubagia Ammal

Hindu Law—Maintenance of widow—Joint family—Calculation—With reference to income and share of the husband at the date of suit—Personal decree refused—Charge on a portion of family property only—Arrears—Right to, in the absence of waiver.

Where in a suit by a widow for maintenance against her husband's brothers it appeared that the major part of the income of the family was derived from a family trade in which the plaintiff's husband took part but had developed considerably since his death.

Held that the amount of maintenance should be fixed by reference to the income of the family as it stood at the date of the suit and not as it stood at the date of the husband's death.

Held that the basis of calculation also should have reference to the husband's share as at the date of suit if he were then alive and not as it was at the date of his death.

Adhi Bai v. *Cursandas Nathu* (1) *Madhava Rav Keshav Tilak* v. *Gangabhai* (2) *Sukan Sahu* v. *Gangajali* (3) followed.

In the circumstances, their Lordships thought that a personal decree was unnecessary or that the maintenance should be made a charge on all the family properties and gave a decree merely charging the maintenance on a portion of the family properties.

A Hindow widow is entitled to arrears of maintenance in the absence of waiver.

Appeal from the decree of the District Court of South Arcot in O. S. No. 44 of 1911.

This was a suit for maintenance by the widow of one of three brothers of an undivided Hindu Family. The plaintiff's husband died in 1897 and the plaintiff continued to live in the family until September 1910 when she separated and brought the present suit for maintenance against the surviving brother's family. In 1897 when plaintiff's husband died, the joint family was possessed of about one acre of wet land and of about one and

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Appeal No. 319 of 1913. 10th August 1914.

1. (1886) I. L. R., 11 B. 199. 2. (1878) I. L. R. 2 B. 639.
3. (1911) 13 I. C. 136.

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a half acres of dry land and was carrying on a small trade in export of Kambay cloths with a capital of about Rs. 5,000 at a small profit. After her husband's death, the trade increased in very great importance, the profits became very large mainly owing to the individual exertions of the surviving members and large properties were purchased also out of the income of the trade. The District Judge found that at the date of the suit the family was possessed of about 22 acres of wet land and 8 and odd acres of tope land besides the original properties, and that the present income of the family amounted to Rs. 17,500 per annum on an average. He decreed her maintenance at the rate of Rs. 50 per mensem with reference to the present income of the family and awarded past maintenance at the same rate. The above appeal has been preferred against the decree of the District Judge. One of the chief contentions in appeal was whether the District Judge was right in assessing the amount of maintenance with reference to the present income of the family properties and whether he should not have given a decree on the basis of the family income at the time of plaintiff's husband's death.

T. Rangachariar and C. Padmanabha Aiyangar for Appellants.

C. V. Anantakrishna Aiyar for Respondent.

T. Rangachariar.—The District Judge erred in the basis on which he awarded maintenance. He ought to have calculated the rate with reference to the state of the family at the time of her husband's death. A widow of a deceased co-parcener is entitled to maintenance only to the extent of her husband's estate that devolved on his co-parceners. This is an admitted proposition of law. She cannot have any claim to a higher degree of comfort than she had during her husband's life-time. Her maintenance is only assessable with reference to her husband's status during his life-time. *Sukan Sahu* v. *Ganga Jali*[1] is not against this view. It is not a case where the main income of the family is out of individual exertions of the family members.

As for husband's status, being the main factor. See *S. M. Karoonamoyee Dabee* v. *The Administrator-General of Bengal* [1],

1. (1890) 9 C. W. N. 651

Pushpavalli Thayarammal v. *Raghaviah Chetty* [1], *Baisni* v. *Rup Singh* [2], *Sreemuty Nitto Kissore Dossee* v. *Jogendra Nath Mullick* [3], *Adhibhai* v. *Cursandas Nathu* [4].

In *Rangathayi Ammal* v. *Munusawmi Chetty* [5], Benson and Sundara Aiyar JJ., observed at page 708 that a widow "could in no event claim more than the income of the share of the estate which her husband would have been entitled to, if a division had taken place during his life-time. Sir Charles Arnold White, Chief Justice and Munro J. appear to have taken the same view in *Subbrayalu Chetty* v. *Kamalavalli Thayaramma*,[6] See also *Meenakshi Ammal* v. *Rama Aiyar* [7] (*vide* Sarkar's Hindu Law p. 352).

C. V. Anantha Krishna Aiyar referred to *Sukan Sahu* v. *Gangajali*[8] *Madhava Rav Keshav Tilak* v. *Gangabai*[9] and Mayne's Hindu Law pp. 634, 635.

The Court delivered the following

Judgment :—The Judge has awarded the sum of Rs. 50 per month for maintenance to the plaintiff, who is the widow of a deceased member of a joint Hindu family. The defendants, her husband's brother and brother's sons, appeal.

It is first contended that the District Judge is wrong in fixing the maintenance with reference to the present income of the family. The major part of the income is derived from the family trade in which the plaintiff's husband took part at the time of his death and which has developed considerably since. The District Judge estimates the present income at Rs. 17,500 a year. It is contended for the appellants that it was not more than Rs. 500 in 1897 when the plaintiff's husband died and the rate of maintenance should be fixed with reference to that income.

It is not contended that the property out of which the plaintiff seeks to be maintained is not joint family property; that the defendants did not take her husband's interest by survivorship and that formed in part the nucleus of this acquisition. It is also clear that if the family income had been reduced, the plaintiff would only get a reduced rate of maintenance and she would

1. (1913) 15 M. L. T. 95.
2. (1890) I.L.R. 12 A.558 at 567.
3. (1878) 5 I. A. 55 at 57.
4. (1886) I. L. R. 11 B. 199 at 209, 210.
5. (1911) 21 M. L. J. 706.
6. (1911) 21. M. L. J. 493.
7. (1912) 24 M. L. J. 106 at 108.
8. (1911) 13 Ind. Cases 186.
9. (1878) I. L. R. 2 B 639.

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not be entitled to have it fixed with reference to the family income at the date of her husband's death. A daughter-in-law may not be entitled to claim any maintenance out of the self-acquired property in the hands of her father-in-law if her husband dies before his father. But she would be entitled to claim it out of the same property after it descends to her brothers-in-law as ancestral property. The character of the property at her husband's death does not therefore always limit her claim. The cases *Adhi Bai* v. *Cursundas Nathu*[1] *Madhava Rav Keshav Tilak* v. *Gangabai*[2] support the view that the share the husband would get if he had been alive at the time of the suit should be taken into consideration and not the share, if any, he was entitled to on his death. We agree with the decision in *Sukan Sahu* v. *Gangajali*[3]. The decision in *Bangaru Ammal* v. *Vijamachi Reddiar*[4] that altered circumstances would justify an increased rate of maintenance proceed on the same principle.

In the cases cited by Mr. Rangachariar there has been no change in the circumstances of the family and they are not therefore in point.

It is then argued that the family properties do not yield Rs. 17,500 a year and the rate of Rs. 50 is too high.

The defendants have not given any evidence as to the income; they did not file their account books, and we are not prepared to say that the Judge is wrong in his estimate of the income, which is only approximate. It is also urged that as the plaintiff was living with her father, she is not entitled to any past maintenance but the finding is that when the two branches of the family became divided and began to live apart she asked the defendants to make some arrangements for her and though they promised to do so eventually they failed to keep their promise. In these circumstances she was obliged to go to her father's house. There was no waiver by her of her claim.

It is unnecessary to make the maintenance a charge on the entire family property. It will be made a charge on items 4 to 25.

No reason is shown why a personal decree should be passed against the defendants. It will be modified in that respect also.

For these reasons we dismiss the appeal with costs with the modification of the decree above indicated.

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1. (1886) I. L. R. 11 B. 199.
2. (1878) I. L. R. 2 B. 639.
3. (1911) 13 Indian Cases, 136.
4. (1898) I. L. R. 22 M., p. 175.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

Gunnam Dorayya ... *Appellant** (*Plaintiff*).

v.

Vadapalli Ayyama Charyulu and another *Respondents* (*Defendants 1 & 2*).

Gunnam Dorayya *v.* Vadapalli Ayyama Charyulu

Mortgage—Mortgagee—Right to pay and claim credit for cesses on land—Government Revenue—Revenue due on other lands included in the same patta, Revenue on mortgaged lands—Revenue Recovery Act II of 1864, S. 42—Transfer of Property Act, Ss. 72 (b) 76 (c)—Sale for arrears of cess—Free of incumbrances.

A sale of land for arrears of water-cess, land-cess and Village Cess would have the effect of extinguishing prior encumbrances and so a mortgagee is entitled to pay the cesses both under S. 72 (b) and 76 (c) and take credit for the same.

Government Revenue due upon other lands contained in the same patta issued in the mortgagor's name is revenue due upon the mortgaged land also ; *Secretary of State for India* v. *Pisipate Sankaraiyer* (1) ref.

Cesses accruing due in respect of the mortgaged property form part of Government Revenue and the mortgagee is bound to pay them in the absence of a contract to the contrary.

Second Appeal from the decree of the Court of the Subordinate Judge of Cocanada in A. S. No. 248 of 1911, preferred against the decree of the Court of the District Munsif of Cocanada in O. S. No. 588 of 1910.

Plaintiff a puisne mortgagee sued for possession of mortgaged property from the 1st mortgagee a usufructuary mortgagee on the ground that the latter's mortgage had been satisfied by the receipt of rents and profits and for redemption in the alternative. The defence was that the first mortgage had not been completely discharged. The first Court held that the defendant who paid water-cess, local-cess and the village-cess due on certain other lands of the mortgagor included in the same patta as the suit land was not entitled to take into account the sums so paid by him and that if these amounts be not given credit for, the mortgage would be discharged and therefore gave the plaintiff a decree. In appeal the Sub-Judge held that the defendant was entitled under S. 72 (b) of the Transfer of Property Act to pay these cesses as otherwise the land would be liable to be sold free from encumbrances under S. 42 of Act II of 1864 and that if the

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* S. A. No. 632 of 1913. 18th August 1914.

1. (1910) I. L. R. 34 M. 493 ; S. C. 20 M. L. J. 794.

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said sums are given credit for, there was still a sum of Rs. 60 outstanding on the mortgage and that the plaintiff was not entitled to redeem before the whole debt was discharged and so dismissed the suit. Plaintiff preferred a second appeal.

B. Narasimha Rao for Appellant.

Patanjali Sastri for *P. Narayanamurti* for Respondents.

The Court delivered the following

Judgment:—The second mortgagee is the plaintiff (appellant); and he seeks to redeem the 1st mortgagee, the 2nd defendant. The 2nd defendant has succeeded in the lower appellate Court on the following conclusions:—

(*a*) that 60 and odd rupees of the principal sum of Rs. 200 (the 1st mortgage amount) was still due to the 2nd defendant on date of suit; and

(*b*) that under the terms of the first mortgage, the 2nd defendant was entitled to hold possession of the lands till that 60 and odd rupees was also wiped out by the usufruct.

The contention of the plaintiff in second appeal is

(*a*) that as the 60 and odd rupees represent irrigation cesses and other cesses due upon other lands of the mortgagor (contained in the same pattah as the mortgaged land) and not cesses due on the mortgaged land (No. 183) itself, the 2nd defendant was not entitled to add that sum to the principal of the mortgage amount and cannot claim a right to remain in possession till that sum of Rs. 60 and odd is also discharged out of the usufruct;

(*b*) that even if the irrigation and other cesses are treated as due upon the mortgaged land (No. 183) also, S. 42 of Act II of 1864 under which sales held for arrears of land revenue are free of prior incumbrances does not apply to sales held for recovery of irrigation cesses, etc., and hence the mortgagee was not bound to pay them under S. 72 (*b*) of the Transfer of Property Act (which requires a mortgagee to spend money for the preservation of the mortgaged property from forfeiture of sale and empowers him to add that sum to the principal money, and

(*c*) that even if contention (*b*) is wrong, the 2nd mortgagee is entitled to redeem the first mortgagee on payment of the said sum of Rs. 60 and odd notwithstanding that the first

mortgage deed fixes no definite term for the redemption of the mortgage and provides for the mortgagee remaining in possession of the land till the principal sum with interest is satisfied out of the net usufruct after paying assessments, etc.

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As regards the first contention, the case of *The Secretary of State for India in Council* v. *Pisipathi Sankarayya* [1], is clear authority that, though for the sake of convenience separate amounts are entered as the revenue due upon separate numbers held under a single pattah, the demand of the sircar and the liability of the landholder is a consolidated demand and the liability for the entire sum mentioned in the pattah charged upon every land is contained in the revenue pattah and that, "we must construe S. 2 as declaring all the land of a landholder to be security for all the land revenue payable by him". It follows that the Government revenue due upon other lands contained in the same pattah issued in the mortgagor's name is revenue due upon the mortgaged land also.

Coming to the next contention, there are two answers to it. The first is that under S. 76 (*c*) of the Transfer of Property Act, the mortgagee must, in the absence of a contract to the contrary, pay the Government revenue and all other charges of a public nature accruing due in respect thereof. Hence, whether the mortgaged property is liable to be sold for these cesses free from prior incumbrances are not, these cesses formed part of the Government revenue accruing due in respect of the property and the mortgagee is bound to pay them in the absence of a contract to the contrary. There is no such contract to the contrary gatherable from the terms of Exhibit I and on the other hand there is a special clause which says that "in case the mortgagor fails to pay sircar assessment, the mortgagee should pay the same to the village officials" out of the net profits.

The second answer to this contention is that irrigation and other cesses charged upon the land are part of the land revenue itself and in our opinion Madras Act II of 1864, S. 42, does apply to sales for the recovery of those cesses. Mr. B. Narasimha Rao, counsel for the appellant, ingeniously argued that as S. 2 of Madras Act, VII of 1865 says "arrears of water-cesses shall be realized in the same manner as arrears of land revenue", " are

1. (1910) I. L. R. 34 M. 493; S. C. 20 M. L. J. 793.

Gunnam Dorayya v. Vadapalli Ayyama Charyulu

or may be realized," that as similar expressions in the Abkari and Income Tax Acts have been construed (See *Ramachandra* v. *Pitchai Kanni* [1]) to mean that only *the procedure* as to the attachment and bringing to sale of the defaulter's property mentioned in Act II of 1864 was intended to be applied to sales for the recovery of arrears due by defaulting abkari renters and income-tax payers and not that the sales of properties held for the recovery of such arrears was free from prior incumbrances; that therefore the sale held for the recovery of arrears or irrigation cesses could not have the benefit of S. 42 of Act II of 1864. We think, however, that this argument ignores the distinction between irrigation cesses and the sums due from abkari and income-tax defaulters. Under Ss. 1 and 2 of Act II of 1866, irrigation cesses have been made part of the public revenue due on the land itself and the provisions of Act II of 1864 apply therefore to the recovery of irrigation cesses; and the Government need not have recourse to S. 2 of Act VII of 1865 at all to claim the powers of attachment and sale, etc., given under Act II of 1864 for the recovery of arrears of public revenue charged upon the land. S. 2 of Act VII of 1865 must, in our opinion, be treated as superfluous and not as restricting modifying or repealing the provisions of S. 42 of Act II of 1864 as regards sales for arrears of irrigation cesses, etc. Our above view is supported by the circumstance that the appellant's learned counsel Mr. B. Narasimha Rao who argued his client's case with much ability and strenuousness was unable to refer us to any case in which it had been held that S. 42 of Act II of 1864 did not apply to sales held for the recovery of arrears of irrigation cesses though it is now almost 50 years since the Irrigation Cess Act was passed. On the other hand, there is a case *Veeranan* v. *Karupayya Pillai* [2] in which Benson and Sundra Aiyar JJ directly decided that S. 42 of the Revenue Recovery Act did apply to sales for recovery of irrigation cesses.

Coming to the last contention, it has been recently held by the Privy Council in *Mussammat Bakhtawar Begam* v. *Mussammat Hussaini Khanam* [3] that "ordinarily and in the absence of a special condition entitling the mortgagor to redeem during the term for which the mortgage is created, the right of redemption

1. (1884) I. L. R. 7. M. 434. 2. (1911) 24 M. L. J. 511.
3. (1914) 26 M. L. J. 474.

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can only arise on the expiration of the specified period." On the true construction of Exhibit I we are satisfied that the mortgagor and the mortgagee both agreed that the principal mortgage money and the interest thereon cannot be paid up except through the enjoyment of net profits by the mortgagee; and this provision in favour of the mortgagee is not illegal according to Indian Law unless perhaps the terms of the mortgage are such that future redemption is made practically impossible.

In the result, the second appeal is dismissed, but under the circumstances there will be no order as to costs in the second appeal.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Kumarasami Sastri.

Sambasiva Mudaliar ... *Appellant** *(Plaintiff)*

v.

The Secretary of State for India in Council. ... *Respondent* *(Defendant).*

Sambasiva Mudaliar v. Secretary of State for India

Limitation—Adverse possession—Suit against Government—Public pathway—Possession for over twelve years—Presumption—Burden of proof of possession by Government within 60 years—Rule as to—Not inflexible.

Where it was found that the plaintiff was in occupation of a portion of a public pathway since 1868 and no act of possession on his part or on the part of the Government prior to that date was proved.

Held, that the pathway being presumably enjoyed by the public, there could be no presumption of possession by anybody else before that time against the Government and plaintiff's suit was rightly dismissed.

Per Kumarasami Sastri, J:—There is no inflexible rule that in a suit against the Government for recovery of possession against the Government plaintiff is entitled to succeed merely by showing possession for over twelve years before suit unless Government can show possession within 60 years. All that the cases decide is that when possession whose origin cannot be definitely fixed has been proved against the Government for a long series of years (not less than twelve) it is reasonable to presume that such possession commenced at a period over 60 years ago so as to throw on the Government the onus of showing either subsisting title or possession within 60 years.

Second appeal from the decree of the Court of the Subordinate Judge of Tanjore in A. S. No. 559 of 1910 preferred against the decree of the Court of the District Munsif of Tanjore in O. S. No. 29 of 1909.

K. B. Ranganatha Aiyar for Appellant.

The Government Pleader for Respondent.

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*S. A. No. 183 of 1912. 20th August, 1914.

Sambasiva Mudaliar v. Secretary of State for India

Seshagiri Iyer

The Court delivered the following

Judgments: *Seshagiri Aiyar, J.*—It is with some hesitation that I agree in the conclusion at which my learned colleague has arrived. The facts found may be thus summarised; (1) The property in dispute is a public pathway; (2) The plaintiff built the projection in front of the house between the years 1868 and 1888 and has been in possession. There is no evidence as to any acts of possession by the plaintiff or the Government prior to 1868. On these findings the courts below have come to the conclusion that the Government have a subsisting title. The decided cases lay down that where a private person proves that he has been in possession for over 12 years, the onus is on the Government to show that they had some possession within 60 years of the suit. I think there are two propositions involved in this—one, that from the fact of possession for a long time a presumption arises that the possessor was in enjoyment for a longer period than is actually covered by the evidence let in by him, and the other, that by way of corollary from the first, the onus is cast on the Government to show that they were in possession within the sixty years which they are entitled to under Article 149. I must take it that the finding that plaintiff was in possession between 1868 to 1898 must be read as meaning that his possession originated only in 1868. Even in this view, the Government has yet to establish that they were in possession within 60 years. It is possible that as against the Government some other person was in possession before 1868. That is the reason why the Government are required to prove a subsisting title. What to a certain extent, has reconciled me to the view that my learned colleague has taken is the fact that the property in question is a public pathway, and the presumption is that the public have been using every portion of it unless some one had encroached upon it and obstructed their user. If that presumption is given effect to, it must follow that prior to 1868, the public as beneficiaries of the Government who have set apart the property for their use has been in enjoyment; and that it was only in 1868 that this enjoyment was interfered with. It is mainly with reference to the peculiar nature of the property that I distinguish this case from *Kutheperumal Rajah* v. *The Secretary*

of State for India [1] *Krishna Aiyar* v. *The Secretary of State for India* [2], *Venkatrama Aiyar* v. *The Secretary of State for India* [3] and *Narayanasami Pillai* v. *The Secretary of State for India* [4].

Sambasiva Mudaliar v. Secretary of State for India

Kumarasami Sastri, J.

The Second Appeal must be dismissed with costs.

Kumarasami Sastri, J.—The plaintiff is the appellant. He sued to recover possession of a portion of the koradu alleged by him to have been taken possession of and wrongfully demolished by the Government and for damages. Both the lower Courts have found that the portion of the koradu claimed by plaintiff and demolished by Government was part of a public street and was encroached upon subsequent to the survey in the year 1868. The appellant contends that the finding of both courts is erroneous and based on insufficient evidence, but I see no reason for holding that the evidence on record is insufficient or that there has been any misappreciation of evidence.

It seems to me that on the findings that there was an encroachment and that it was not prior to the year 1868 the suit was rightly dismissed. Under Madras Act III of 1905 all public roads and streets are deemed to be the property of the Government and it is not disputed before us that the case should be treated on the footing that the street is Government property. The contention of the appellant's vakil is that as the appellant has on the findings of both courts proved possession for only 40 years it should be presumed that possession was with him prior to that and that it lay on the Government to show that they were in possession at any time within 60 years prior to the date of suit. Reliance has been placed on *Krishna Aiyar* v. *The Secretary of State for India*,[2] *Venkatarama Aiyar* v. *The Secretary of State for India in Council*,[3] and *Narayanasami Pillai* v. *The Secretary of State for Inida* [4]. I do not think that these cases lay down an inflexible rule that in a suit against the Government for recovery of possession of immoveable property and damages for trespass, the plaintiff is entitled to succeed merely by showing possession for over twelve years before suit unless the Government can show possession or title within sixty years. All that

1. (1907) I.L.R. 30 M. 245. 2. (1910) I.L.R. 33 M. 173 S. C. 20 M.L.J. 71.
3. (1910) I. L. R. 33 M. 362 S. C. 20 M. L. J. 74. 4. (1912) 23 M. L. J. 162.

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they decide is that when possession whose origin cannot be definitely fixed has been proved against the Government for a long series of years (not less than twelve) it is reasonable to presume that such possession commenced at a period over sixty years ago so as to throw on the Government the onus of showing either a subsisting title or possession within sixty years.

In the present case the property encroached upon was a public street at the time of the encroachment and user by the public till the date of the encroachment will be equivalent to possession by the Government. I find nothing which would justify the inference that any body except the Government was in possession prior to the year 1868, the earliest possible year when the appellant or his predecessors in title could have got into possession.

The appeal fails and is dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

Kathiresan Chettiar ... *Appellant** (*Petitioner*)

v.

Ramasami Chettiar and others ... *Respondents* (*Defendants*)

Kathiresan Chettiar v. Ramasami Chettiar

Civil Procedure Code—O 21, r. 90—"Whose interests are affected by the sale"—Decree-holder not entitled to rateable distribution—Not within.

A decree-holder that has not applied for execution and is therefore not entitled to rateable distribution of the proceeds of the sale is not a person whose interests are affected by the sale within the meaning of order 21, rule 90 and cannot apply to set aside the sale for fraud. The interest referred to in the rule is interest in the property sold. *Jogendranath Chatterjee* v. *Monmothanath Ghose* (1) followed.

Appeal from the order of the Court of the Subordinate Judge of Madura East in E. A. No. 22 of 1910 (O. S. No. 64 of 1909 on the file of the District Court of Madura.)

T. Rangaramanuja Chariar for Appellant.

S. Varadachariar for S. Gopalasami Aiyangar for Respondent.

The Court delivered the following

Judgment:—*Napier, J.*—This is an appeal arising out of an execution application in the Court of the Subordinate Judge of

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* A.A.O. No. 225 of 1910. 12th August 1914.

1. (1912) 17 C. W. N. 80.

Kathiresan Chettiar v. Ramasami Chettiar. — Napier J.

Madura (East) under O. XXI, R. 90 of the Civil Procedure Code in O. S. No. 64 of 1909. The decree-holder in another suit O. S. No. 167 of 1908 had attached certain properties of the defendants and brought them to sale. The sale was held and the purchase money paid and received by the Court. Fourteen days after this payment the petitioner herein presented an application for execution of the decree which he had obtained sometime previously, by the attachment and sale of the properties above referred to with an application to set aside that sale and a further application for rateable distribution in the assets already realized by the sale. The Subordinate Judge dismissed his application for rateable distribution on the ground that he was not entitled to it not having applied to the Court for execution of his decree before the receipt of the assets by the Court and for the same reason dismissed his application to set aside the sale. This appeal is from that order,

In this Court the appellant does not ask for rateable distribution of the realised assets as he wishes the sale to be set aside on the ground of fraud. He does not claim to be a "person entitled to share in a rateable distribution of the assets" but he contends that he is a person "whose interests are affected by the sale" and is therefore entitled to apply. These words are newly inserted in the Code of Civil Procedure of 1908 and are also to be found in R. 72 of the order. The language could certainly be read as wide enough to include a person in the appellant's position if taken by itself, and it is no answer that these words were inserted to set at rest doubts existing on the language of the old Code as to the meaning of the words " whose immoveable property has been sold." It may be that the legislature intended by these words to describe persons claiming the judgment-debtor's interest and it may also be that this is the true construction of the rule, but it cannot be so held for the mere reason that these wider words were substituted for the very narrow words in the previous Code, what we have to look to being the words themselves and not the intentions of the legislature. It is sufficient, however, for the purpose of this case to decide as we do, that the applicant is not a person " whose interests are affected by the sale" within the meaning of the rule. This conclusion can be arrived at by

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Napier, J.

two methods. The first is that adopted in *Jogendra Nath Chatterjee* v. *Monmothanath Ghose* [1]. There the Court held that the word "interests" must be limited to the property, the subject of the application and that, as the subject matter of the sale sought to be set aside was the immoveable property sold, the interest that must have been affected by the sale must have reference to the same property. Taking that view the court held that the applicant had no *present* interest in the property, an attachment before judgment not giving him such interest. We agree that it is a necessary limitation of the word "interests" to confine it to the property concerned as any other construction would open up an enquiry as to whether the appellant's pecuniary interests required satisfaction out of the property sold or whether there was other property available to him. It would further be difficult to draw a line between a decree-holder and a person claiming to be a creditor—and if a creditor was a person whose interests were affected it would necessitate the trial of his suit in the execution proceedings, a procedure which could never have been contemplated. There is another process leading to the same result, which is this. The rule specifically gives power to apply to a "person entitled to share in a rateable distribution of the assets." These words are added in the present Code, the old Code providing simply for the decree-holder. The words, therefore, extend the right to a person other than a party to the suit or his representative but confine it to a certain narrow class of persons. If a person of the class of the applicant, namely another decree-holder *not* entitled to share, is to be considered as covered by the relative words "whose interests are affected by the sale" we have this extraordinary result, that the Legislature after inserting the words to extend the right and then confining it by very limited language has nullified the effect of those words by words of wider application in the next sentence. In our opinion this is not an interpretation which can be properly put on the language of the rule were any other construction possible, and we hold that any decree-holder who has not obtained the right to share in a rateable distribution is not entitled to apply under the wider words of the succeeding sentence.

This appeal therefore fails and is dismissed with costs.

Sadasiva Aiyar, *J*:—I entirely agree.

1. (1912) 17 C. W. N. 80.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Tyabji.

Bommaya Hegade ... *Appellant** (*Plaintiff*)

v.

Srinivasa Hebbara .. *Respondent* (*Defendant.*) in S. A. No. 1627 of 1912.

v.

Jalayakshi, minor by her guardian Anandram Madi. ..: *Respondent* (*Defendant.*) in S. A. No. 2231 of 1913.

Bommaya Hegade *v.* Jalayakshi.

Hindu Law—Will—Construction—Annuity for life for maintenance given by will of the husband—Does not lapse for unchastity—Conditions not to be added.

There is no certain and necessary implication that a Hindu who provides for the maintenance of his wife after his death intends to deprive her of it if she should become unchaste.

It is not open to courts to add to the terms of the will and impose conditions on the legatee which the testator might have imposed if certain contingencies were present to his mind.

Held accordingly that an annuity given to the wife for her maintenance by the will of the husband purporting to be for her life would not lapse by her unchastity.

Parami v. *Mahadevi* (1) followed.

Second appeals from the decrees of the Courts of the Subordinate Judge of South Canara in A. S. No. 524 and 523 of 1910 preferred against the decrees of the Court of the District Munsif of Udipi in O. S. Nos. 435 and 434 of 1909 respectively.

B. Sitarama Rao for Appellant.

K. Y. Adiga for Respondent.

The Court delivered the following

Judgment:—Following *Parami* v. *Mahadevi* [1] we hold that unless there is an ambiguity in the terms of the will of a Hindu testator, the rule that the will of a Hindu must be construed with due regard to Hindu habits and notions has no application. That rule can be properly applied only for the purpose of construing the terms of the will and not for the purpose of controlling or adding to its provisions. Even if that rule is applied, it was held in that case that there is no certain and necessary implication that a Hindu who, by

* S. A. Nos. 1627 and 2231 of 1912. 14th July 1914.

1. (1910) I.L. R. 34 B. 278.

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will provides for the maintenance of his wife after his death, intended to deprive her of the maintenance if she becomes unchaste. Their Lordships of the Privy Council say in *Rajah Venkata Narasimha Appa Row* v. *Rajah Parthasarathi Appa Row* [1]. "The Court is, in no case, justified in adding to the testamentary dispositions. The Court never adds to a will anything which needs to be done by testamentary disposition. In all cases it must loyally carry out the will as properly construed and this duty is universal and is true alike of wills of every nationality and every religion or rank of life."

The will in this case gives the testator's widow a clear right to receive till her death a certain quantity of rice yearly for her maintenance and she could not be deprived of such right by adding to the will certain words and terms which the testator might be presumed to have intended to add if certain future contingencies had been in his mind when he made the will.

Discharging therefore the decrees of the Lower Courts the plaintiff will be given a decree for recovery of the value of the maintenance due for all the four years mentioned in the plaint at the rates decreed by the Munsif and with interest as mentioned therein with costs in all Courts.

A similar decree will be given in the connected second appeal.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Charles Arnold White, Chief Justice, and Mr. Justice Seshagiri Aiyar.

Sree Sree Sree Madana Mohana Ananga Bheema Deo Kesari Gajapati late a minor, by Sree Sree Sree Kundana Devi Putta Mahadevi, his next friend but now having attained majority. *Vide* Order on C. M.P. No. 371 of 1911, dated 4-5-1911. ... *Appellant* (*Plaintiff*)

Sree Sree Sree Purushothama Ananga Bheema Deo ... *Respondent* (*1st defendant*).

Madana Mohana Deo v. Purushothama Deo.

Hindu law—Adoption—Authority to adopt—Construction—Extrinsic evidence—Admissibility of—Limits on the exercise of—Impartible Zamindari—Joint family property—Rule as to adoption to last male owner—Not applicable to—Existence of

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* A. No. 65 of 1911 22nd April 1914.

1. (1914) 26 M. L. J. 411 at 424

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adopted son's widow—Bar to exercise of authority by widow—Rules imposing limitations—Nature of—Purpose of adoption—Custom of Puo-Brahmin—Adopted son living for 36 years—Not effectuated by.

Adikonda Deo, Zamindar of Chinnakimidi (an impartible Zamindari) died on 23rd November 1868. Prior to his death, on 20-11-1868, he gave authority to his wife Kundana Devi to adopt a son to him. In pursuance of the authority, she adopted Brojo Kishore Deo on 20-11-1870. Brojo Kishore died on 3-9-1906 leaving his widow him surviving. Vaishnava Deo, the undivided nephew of Adikonda succeeded to the Zamindari but died 15 days after his accession on 18-11-1906. Defendants 1 and 2 were his sons. Kundana Devi the widow of Adikonda purporting to act on the authority conferred on her by her husband adopted the plaintiff on 1-12-1907 who sued to recover the Zamindari from the defendants.

Held, that the authority conferred on the widow was not exhausted by a single adoption but the existence of the adopted son's widow Ratnamala who though not a person in whom the Zamindari vested, was competent to adopt a son in whom the estate would vest in preference to the plaintiff, presented a bar to its exercise.

Per Seshagiri Aiyar J: (Chief Justice *dubitante*), the rule of law that in order that an estate once vested may be divested, the adoption should be made to the last male owner is not applicable to co-parcenary property and impartible Zamindari is joint family or co-parcenary property subject to an exception.

Per *Chief Justice*: With reference to the construction of authorities, to adopt, the only safe rule is to try and ascertain the intention of the donor of the power from the terms in which the authority is given viewed in the light of such extrinsic evidence as would be admissible if the question was the construction of a will. Evidence that the husband who gave the authority was at enmity with his brother and was anxious to exclude him from succession would be admissible extrinsic evidence but evidence that the first adopted son lived for 36 years and that events happened between the granting of authority and the second adoption which if the testator could have foreseen it might have made likely that he would have restricted the authority is extrinsic evidence which is not admissible.

Per Seshagiri Aiyar J:—The fact that it is customary among the Uriya Zamindari families to employ a Po-Brahmin to perform funeral ceremonies to the deceased is not a ground for putting a restricted construction on the authority.

An authority to adopt given by a Hindu husband to his wife is presumed to be general unless conditions have been imposed or limitations placed upon it by him.

The spiritual purposes for which an adoption is made are not effectuated by the adopted son living for 36 years. 'The only limitations upon the power of the widow to adopt in pursuance of the authority given by the husband recognised by the texts are that " the man should be destitute of a son " and that she cannot delegate the power; the other restrictions the courts have thought fit from considerations of expediency to place upon the exercise of that power are attributable to a desire that property should not be divested frequently and capriciously and are the outgrowth of ideas tending to the preservation of peace and quieting of title Such being the principle of judicial pronouncements relating to the divesting of property, it will not advance justice to crystalise them into inflexible and rigid rules and then to engraft exceptions on them.

Suryanarayana v. *Venkatramana* (1) *Ramkrishna* v. *Sham Rao* (2) followed.

1. (1906) I.L.R. 29 M 382 (P.C.) 2. (1902) I.L.R. 26 B 526

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Appeal from the decree of the District Court of Ganjam in O. S. No. 12 of 1908.

The following statement of facts is taken from the Judgment of Seshaghiri Aiyar J.

Adikonda Deo Zamindar of Chinnakimidi died on the 23rd November 1868. Prior to his death, on the 20th November 1868, he gave authority to his wife Kundana Devi (Exhibit B) to adopt a son to him. She was then pregnant and subsequently gave birth to a daughter; she adopted Brojo Kishore Dev on the 20th November 1870. Between the death of Adikonda and the adoption, the Zamindari vested in Raghunatha Dev, the undivided younger brother of adikonda. The authority to adopt having been disputed a suit was instituted (O. S. No. 1 of 1871) on behalf of the adopted son to recover possession of the Zamindari. The matter went up to the Privy Council. It was decided that the authority to adopt was genuine and that the adopted son divested Raghunatha Dev (*Sri Raghunadha* v. *Sri Brojo Kishore* [1]. Brojokishore died on the 3rd September 1906 leaving his widow Ratnamala him surviving. She is alive but not a party to the present litigation; Vaishnava Deo, the son of Raghunadha Deo succeeded to the Zamindari on the death of Brojokishore: he died on the 18th November 1906 15 days after his accession: defendants 1 and 2 are his sons. Kundana Devi, the widow of Adikonda purporting to act on the authority conferred on her by her husband, adopted the plaintiff on the 1st December 1907. This suit is on behalf of the 2nd adopted son to recover the Zamindari from the defendants. The defendants plead that the power given by Adikonda did not enable his widow to make a second adoption, that the existence of Ratnamala the widow of Brojokishore is a bar to the exercise of power, even if it was not exhausted by the first adoption; and that the adoption not having been made to the last male holder it is invalid. The learned District Judge of Ganjam (*T. Sadasiva Aiyar J.*) in a very elaborate judgment held that plaintiff's claim was unsustainable and dismissed the suit. The terms of the authority will be found set out in *Raghunadha* v. *Brojo Kishore* .

1. (1876) L.R. 3 I. A. 154. S. C. I. L. R. 1 M. 69.

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The District Judge in the course of his judgment analysed the points for decision as follows:—

"For the sake of clearness, I shall formulate the remaining question involved in the second and fifth issues as follows in some detail:—

2 *a.* Does Exhibit B of 1868, the authority to adopt, given by Adikonda Deo to Kundana Devi give her the power to take a second son in adoption in case the son first adopted died without leaving legitimate male issue? Can that intention be gathered from a fair construction of the deed?

2 *b.* Ought such intention, even if it existed, to be confined to the case where the 1st adopted son leaves no widow, capable of continuing the line by herself making an adoption to the first adopted son?

2 *c.* Did that authority to adopt a second son (even if it existed) come to an end when the first adopted son died leaving a widow who would be the heir to his estate if it was not an impartible Zamindari? Does the fact that the Zamindari at his death vested in the 1st adopted son's uncle Vaishnava Deo and not in the first adopted son's widow prevent the authority (Exhibit B) from becoming extinct?

2 *d.* Did the first adopted son and Vaishnava Deo and 1st defendant form a Hindu co-parcenary joint family? Did Vaishnava Deo hold the proprietary rights in the Zamindari (for 15 days after the 1st adopted son's death) through succession by inheritance from the 1st adopted son or through survivorship as co-parcener?

2 *e.* Even if before the Impartible Estates Act, the male member of a Zamindari family (other than the holder for the time being) had no co-parcenary right or right of survivorship in the proper sense in the Zamindari estate, have these Acts by declaring the inalienability of the Zamindari estate except for purposes binding on a manager (not a father or grandfather) of a joint Hindu family, restored the co-parcenary and survivorship rights of the said members?

2 *f.* If co-parcenary existed between the 1st adopted son and Vaishnava Deo, did it prevent the authority of Kundana Devi from becoming extinct? Is there no restriction of time within which a Hindu widow with power to adopt can exercise the same provided the joint family to which her husband belonged

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continues in existence? When does such a family cease to exist as a joint family.

5 *a.* Even if the authority to adopt did not come to an end at Brojokishore's death and the vesting of the *Zamindari* in Vaishnava Deo and even if the plaintiff's 2nd adoption is valid, is it of no legal efficiency to divest the estate which vested in Vaishnava Deo and then in 1st defendant, because the adoption was not made to the last male holder of the Zamindari, Adikonda Deo having been followed by three persons in succession before the 2nd adoption of plaintiff was made?

5 *b.* Is the doctrine of "the last male holder" formulated by Mr. Mayne in para 191 of his well-known work, not deducible from the authorities?

5 *c.* Has that doctrine no place at all in the case of a joint Hindu family because no member of such a family can be said to hold any definite interest in any of the family properties? (This was the contention of plaintiff's learned Vakil, Mr. P. R. Sundara Aiyar, if I comprehended it aright), or can a deceased male member in a joint Hindu family be properly called the last male holder of the share which would have been declared to be his if a suit for partition had been decreed at the moment of his death? Hence could the doctrine of the last male holder be properly applied to an adoption made by his widow to him? (This was what the learned Advocate-General contended if I understood him properly.

5 *d.* Even if that doctrine has no place in an ordinary Hindu joint family ought it to be applied in respect of an impartible zamindari estate which descends to a single heir who is the sole owner of the estate?

9. It will be thus seen that the two issues 2 and 5 really involve the consideration of 10 different (though connected) contentions."

On question 2 (*a*) he held "That the decision in *Suryanarayana* v. *Venkataramana* [1], which allowed a second adoption (under a very general authority to adopt given to a widow) when the 1st adopted son who was intended to perform his father's Sradh died a few months after adoption while still a baby cannot be extended to the case of a zamindar who had no necessity to

1. (1906) I. L. R. 29 M. 382. S. C. 16 M. L. J. 267.

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have an adopted son except to inherit the estate as his son and the authority given by him cannot be construed as implying a power to adopt a second time without any limit of time and even after three successions had opened since the power was given."

The next question is whether the authority should be held to have come to an end when the 1st adopted son died leaving a widow after inheriting the estate. That was almost exactly the case in *Bhooban moyee Debya* v. *Ram Kishore Acharjee*,[1] the only difference being that in that case, the natural son inherited and died leaving a widow, whereas in this case the 1st adopted son so died leaving a widow. Mr. P. R. Sundara Aiyar argued that ruling applied only to cases under the Dayabagha law or to cases where the person giving the authority leaves separate or self-acquired property which is inherited by his son (natural or adopted) and which then, at the son's death, vests in his widow and not to cases where the man giving authority to his widow to adopt belongs to a joint Hindu family and his interests pass by survivorship to his son as co-parcener and then from the son pass by survivorship to the other co-parcener or co-parceners. He laid much stress on the observations as to the estate having vested in the widow of the son, found in that case and in other cases and explained away learnedly the omissions (in several other passages in those cases) to mention the fact of the vesting in the widow as the *ratio decidendi*. This leads to question 2 (c) namely whether the fact of the estate having not vested in the son's widow but in Vaishnava Deo at the first adopted son's death makes any difference. I do not think that the particular fact of the estate of the man who gave the authority to his widow to adopt having vested in the widow of his son in that case is the *ratio* of the Privy Council decision. The fact that it had vested in an heir of the son is the *ratio decidendi* and even that is only one of the several reasons for the Privy Council decision in *Bhooban Moyee's case*. That decision rested on several independent grounds as I understand it and those reasons are,

1. Though the authority to adopt does not assign any limits to the period within which the adoption may be made, "it is plain that some limits must be assigned."

1. (1865) 10 M. I. A. 279.

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2. "It could hardly have been intended" (by the donor) "that after the lapse of several successive heirs a son should be adopted."

3. "All the spiritual purposes of a son according to the largest construction of them would have been satisfied" by the natural son or the 1st adopted son having "lived to an age to perform all the religious services which a son could perform for a father.

4. The natural son (or 1st adopted son) "could have alienated" the estate during his life-time and "could have defeated every intention which his father entertained" (and hence the power to adopt given by the donor must not be kept alive after the son's death).

5. The son's widow "having acquired a vested estate," it "seems contrary to all reason and to all the principles of Hindu Law" that she should be divested. I am unable to hold that this last reason (5) is the only sustainable reason for the Privy Council decision, though even this reason is sufficient to defeat the plaintiff's adoption in this case, notwithstanding the difference that the estate of the son vested in this particular instance not in the widow but in Vaishnava Deo on the son's death. If Vaishnava Deo and 1st defendant (after Vaishnava) got by inheritance in the strict sense and not by survivorship and if the *Zamindari* became vested in the 1st defendant how could 1st defendant be divested by a subsequent adoption? (the question whether it vested by inheritance or survivorship will be further considered later on). The argument that it must become vested in the son's widow and not in any other person to put an end to the authority to adopt is, in my opinion, futile though ingenious for, the ground of the Hindu Law Rule is to prevent as far as possible, the inconvenience of divesting an estate once vested and the particular heir in whom it vested is quite immaterial.

The reason (3) of the Privy Council decision namely, of the 1st son having "lived to an age to perform all the religious services and etc." can, no longer, be held valid. I do not wish to notice in detail the several conflicting opinions as to whether tonsure or Upanayanam or marriage of the boy before his death is the criterion to decide whether all spiritual benefits had been received by the father through his existence (in the present case, the controversy is irrelevant as the adoption confers no spiritual

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benefit at all and the Puo Brahmin confers all that class of benefits). Having regard to the case in *Ramsoondar Singh* v. *Surbanee Dossee*[1] (the observations of Mr. Justice Romesh Chander Mitter in which case have been adopted by the Privy Council in *Suryanarayana* v. *Venkatramana*[2]) the third reason given by the Privy Council in *Bhooban Moyee Debya* v. *Ram Kishore Acharjee*[3] must be held to be no longer of much force. But the other four reasons continue equally applicable and there is nothing to show that those principles should not be applied to an undivided Hindu family so far as they are applicable. I shall consider in detail how far these four reasons are applicable to a joint Hindu family later on, when I deal with the further principle of "the last male holder." I need only say here shortly that these four reasons clearly apply to the present case where "several successive heirs" have taken the estate and where the 1st adopted son could have defeated all the objects of a second adoption by the alienation of the estate before the Impartible Estate Acts were passed.

I shall close this part of the case with one further remark, and that is that an orthodox pandit if asked whether a widowed mother-in-law could adopt when she has got a widowed daughter-in-law, would probably answer the question in the negative. In West and Buhler, Page 979, it is said "The son whether begotten or adopted acquires rights and becomes a source of rights ...The authority to adopt (given by the father) cannot be made a means of upsetting the law on which it rests, the widow (of the father) can exercise the authority only when the son dies unmarried or leaving no child or widow." Then at page 988. "On the death of the father-in-law without adoption, they (the pandits) prefer to his widow, the widow of his son by whose adoption, the manes of both father and son may be appeased". In page 405, question 22 was put to the pandits as follows :—"A widow adopted a son who died after his marriage which of the two can adopt a son ?". Answer "The deceased, though adopted by the widow" became heir of her husband On his death, his widow is the last heir. She therefore has the right to adopt a son and her adopted son can perform the

1. (1874) 22 W. R. 121.
2. (1906) I. L.R. 29 M. 382 at 389. S.C. 16 M.L.J. 276.
3. (1865) 10 M. I. A. 279.

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funeral rites for his mother as well as his grandmother. The mother-in-law therefore cannot, unless there is a good reason for it, adopt a son (of course, the pandits, as usual qualify their answer by the phrase "unless there is a good reason for it." The good reason may be the daughter-in-law being as good as dead by reason of insanity or excommunication or apostacy before her husband's death). Thus, the Privy Council ruling in *Bhuban Moyee Debya* v. *Ram Kishore Acharjee*[1] that the existence of a daughter-in-law capable of herself adopting extinguishes, the mother-in-law's authority is by no means opposed to Hindu notions. I therefore answer questions 2 (*b*) and 2 (*c*) also against plaintiff and in favour of the defendants.

As regards 2 (*d*) and 2 (*e*) he held that there was no real co-parcenary and hence no survivorship in the true sense. As to 2 (*f*) he held that the power was subject to the last male holder rule.

On questions 5 (*a*) to (*d*) the District Judge after referring to *Ayyagari Venkataramayya* v. *Ayyagari Ramayya*[2], and *Bachoo* v. *Mankorebai*[3], held that the last male holder principle was not inapplicable to joint families. He next referred to the rules stated by Mayne para 191 and by Telang, J. in *Chandra* v. *Gojarabai*[4] and to the case in *Rathna Mudaliar* v. *Raghunada*[5] and finally answered question 5 (*a*) to (*c*) against plaintiff.

In conclusion he added "Even if my view is wrong on these points, I feel no reasonable doubt in answering under question 5 (*d*) that the principles governing adoption to the owner of separate properties are more properly applicable to the case of an impartible estate held in full ownership by a single heir than the principles governing adoption to a member of an undivided co-parcenary owning joint family property."

Against this decision an appeal was preferred to the High Court.

K. Srinivasa Aiyangar and *Surya Narayana* for the Appellant contended (1). As to the construction of the authority, Ex. B is not restricted to a single adoption. The point is concluded in plaintiff's favour by the decision in *Suryanarayana* v. *Venkatramana*[6],

1. (1865) 10 M.I.A. 279.
2. (1902) I. L. R. 25 M. 690.
3. (1904) I.L.R. 29 B 51.
4. (1890) I. L.R. 14 B. 471.
5. (1898) 8 M. L. J. 173.
6. (1906) I. L. R. 29 M. 382 (P. C.) S.C. 16 M. L. J. 276.

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see also the judgment of the High Court in that case. *Suryanarayana* v. *Venkatramana*.[1] The proper point of view is not whether more than one adoption is authorised but whether the power is restricted to one, see also *Bhagwat Pershad* v. *Murari Lall* [2], *Dharam Kunwar* v. *Balwant Singh* [3]. In the circumstances of the present case Adikonda would surely have wished that the Zamindari should never go to Raghunath Deo's line.

2. As to the validity of the adoption, there is no other limitation in the case of adoption into a joint family than that the widow should adopt during her life-time. There is no place here for any doctrine of vesting and divesting. The divesting doctrine is not based on any Hindu Law text but has been developed by case law. All the cases relate only to inheritance and not to survivorship.

The inapplicability of the rule in Bhubun Moyee's case to joint families is shown by the decisions of the Privy Council in *Sri Virada Pratapa Raghunada Deo* v. *Sri Brozo Kishor Patta Deo* [4], *and Bachoo* v. *Mankorebai* [5], see also *Chandra* v. *Gojarbai* [6], *Vithoba* v. *Bapu* [7], *Amaya* v. *Mahad Gauda* [8], *Bachoo* v. *Mankorebai* [9], *Krishna* v. *Sami* [10]. An estate vested in a co-parcener can be divested by the birth of a new co-parcener *Surendra Nandan* v. *Sailaja Kant Das Mahapatra*[11]. The same principle will apply to adoption. The last male holder rule will not reconcile all the cases. For instance the Guntur case *Vellanki Venkata Krishna Rao* v. *Venkata Rama Lakshmi* [12] where the adoption was made not to the last male holder but to his father, and *Thayammal* v. *Venkatarama* [13] is not a case of joint property. The mere existence of the daughter-in-law without the estate vesting in her is no bar to the mother-in-law making an adoption. See *Gopal* v. *Vishnu*[14]. The case in *Rathna Mudaliar* v. *Raghunada Bhatta* [15], was a case of inheritance and not of survivorship. The imparti-

1. (1902) I.L.R. 26 M. 681. 2. (1910) 15 C.W.N. 524.
3. (1912) I.L.R. 34 A. 398(P. C.)
4. (1876) I. L. R. 1 M 69 (P. C.) 5. (1907) I. L. R. 31 B 373 (P. C).
6. (1890) I. L. R. 14 B 462. 7. (1890) I. L. R. 15 B 110 at 129.
8. (1896) I. L. R. 22 B. 413 at 420. 9. (1904) I. L. R. 29 B 51, 56.
10. (1885) I. L. R. 9 M 78. 11. (1891) I. L. R. 18 C 385.
12. (1870) I. L. R. 1 M 174; S. C. 4 I. A. 18.
13. (1887) I. L. R 10 M 205; S. C. 14 I. A67.
14. (1898) I. L. R. 23 B 250. 15. (1898) 8 M. L. J. 173.

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ble estate in this case passed to the defendant by survivorship and not by inheritance. *Zamindar of Karvetnagar* v. *Trustees of Tirupati Devastanam* [1] does not decide this question. The cases on the subject are reviewed in *Tirumal Rao Saheb* v. *Ranghadhani Rao Saheb* [2]. The question of the validity of the adoption in circumstances like the present was incidentally dealt with in *Sivagnanam Servaigaran* v. *Ramasami Chettiar* [3], but it was not necessary to decide the point.

S. Srinivasa Iyengar and *Varadachariar* for the Respondent contended—

1. On the question of the construction of the authority-

The case is governed by the rule laid down by the Privy Council in the *Medur* Case, Exhibit B. provides for an adoption only in a particular contingency and for none other. We can't add to it. The reasons given in *Suryanarayana* v. *Venkatramana* [4], won't apply here. It is clear from Exhibit B. that only secular motive operated. Among the Uriya Zamindars spiritual purposes are attended to not by the son but by PuoBrahmins. In any event Adikonda could not have intended the authority to be acted upon after such a long time in the changed circumstances of the family and while his daughter-in-law is alive and in a position to perpetuate the family. See *Mussamat Bhooban Moyee Debia* v. *Ram Kishore Acharjee Chowdhry* [5], and the passage cited in *Suryanarayana Venkatramana* [4], from the Ramnad case.

2. As to the validity of the adoption—

The authority came to an end as soon as the estate vested in Vaishnava Deo; at all events when it vested in the first defendant. The rule as to divesting is not inapplicable to joint families. In any view the adopted son will only be a collateral in reference to Vaishnava who was the last owner and he cannot take even by survivorship in preference to Vaishnava's son. The defeasibility laid down in *Sri Virada Pratapa Raghunadah Deo* v. *Sri Brozo Kishore Patta Deo* [6] cannot apply even after Vaishnava's death, the rule being succession must be traced

1. (1909) I.L.R. 32 M 429. 2. (1912) 23 M. L. J. 79.
3. (1909) 22 M. L. J. 85. 4. (1903) I. L. R. 29 M 382 at 385 (P.C).
5. (1865) 10 M. I. A. 179 6. (1876) I. L. R. 1 M. 69 (P. C.).

to the last male holder. See *Sivagnanam Servaigaran* v. *Ramasami Chettiar* [1], where the question is fully discussed. The existence of the daughter-in-law by itself bars exercise of the authority by the mother-in-law. It is not necessary that the estate should vest in the daughter-in-law *See Bhubun Moyee's* case [2] *Ramakrishna* v. *Sham Rao* [3] *Manikyamala Bose* v. *Nanda Kumar Bose* [4], and West and Buhler pp. 979, 988. Suppose the deceased son has left self-acquired property which vested in the widow, it cannot be said that the adoption will be good as regards joint family property but bad as regards the self-acquired property.

In any case impartible property is not joint family property to which the rule of survivorship applies. See *Ramasami Naik* v. *Ramasami Chetti* [5], and *Zamindar of Karvetnagar* v. *Trustee of Tirumali Tirupati Devastanams* [6]. The case in *Tirumal Rao Saheb* v. *Rangadani Rao Saheb* [7] related to the right to maintenance.

K. Srinivasa Iyengar replied.

The Court delivered the following

Judgments:—*The Chief Justice*: The material facts for the purposes of this appeal are set out in the judgment of my learned brother which I have had the advantage of reading. I need not repeat them. The questions for determination are—

(1) Was the second adoption within the powers conferred by the authority to adopt (Exhibit B)?

(2) If so, (*a*) was the adoption though not made to the last male holder effective for the purpose of divesting the estate an interest which, at the date of the adoption had become vested in the defendants?

(*b*) Was the fact that Adikonda's son's widow was alive when the adoption was made to Adikonda a bar to the exercise of the power?

As pointed out by their Lordships of the Privy Council in *Suryanarayana* v. *Venkataramana* [8] "the main factor for consideration in these cases is the intention of the husband. I think the only safe rule is to try and ascertain the intention of the donor of the power from the terms in which the authority is

1. (1911) 22 M. L. J. 85
2. (1865) 10 M. I.A. 279.
3. (1902) I. L. R. 26 B 526.
4. (1906) I. L. R. 33 C 1306.
5. (1906) I. L. R. 30 M 255. S. C. 17 M. L. J. 201.
6. (1908) I. L. R. 32 M 429.
7. (1912) 23 M. L. J. 79.
8. (1906) I. L. R. 29 M. 382. S. C. 16 M. L. J. 276.

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given viewed in the light of such extrinsic evidence as would be admissible if the question for consideration were the construction of a will. In the present case for instance in my opinion evidence that the husband who gave the authority was at enmity with his brother and was anxious to exclude him from the succession would be admissible extrinsic evidence as evidence of an attendant circumstance. Evidence that the first adopted son lived for 36 years, and that events happened between the giving of the authority and the second adoption which if the testator could have foreseen them might have made it likely he would restrict the authority to one adoption, seems to me to be extrinsic evidence which is not admissible.

As regards the *argumentatum ab inconvenienti* on which the learned Judge lays considerable stress I think considerations of convenience have more relevance in connection with the second and third questions than with the question of construction. No doubt there are passages in some of the judgments in the cases to which the learned District Judge refers which lend support to his view that for the purposes of ascertaining the intention of the donor of the power subsequent events might be looked to. The learned Judge cites a passage from the judgment in *Mussamat Bhoobun Moyee Debia* v. *Ram Kishore Acharji Chowdhry* [1] "It could hardly have been intended that after the lapse of several successive heirs, a son should be adopted to the great grandfather of the last taker." This was an observation with reference to the particular case before their Lordships. I do not think Their Lordships intended to lay down any general canon of construction.

With all respect to the learned District Judge, I think the authority in the present case, read by the light of the Judgment of the Privy Council in *Suryanarayana* v. *Venkataramana* [2] is sufficiently wide to include a second adoption.

As regards the 2nd question it is common ground that the adoption was not made to the last male holder, and that when it was made, the Zamindari had vested in Vaishnava Deo and his son successively. The contention on behalf of the appellant was that the rules suggested by Mr. Mayne in paragraph 191 of his book are not applicable to joint Hindu families living under the Mitakshara law.

1. (1865) 10 M. I. A. 279. 2. (1906) I. L. R. 29 M. 382.

As regards this question whilst I do not desire expressly to dissent from the view which my learned brother takes, I am not satisfied that the view which I took though the point did not then actually arise for decision in *Sivagnanam Servaigar* v. *Ramasawmy Chettiar* [1] was wrong. I do not think it necessary to discuss this question further since I agree with my learned brother's conclusion with reference to the 3rd question *viz.*, that in the present case the power is not exercisable by reason of the fact that Brojokishore's widow was alive when the adoption in question was made by Adikonda's widow.

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I would dismiss this appeal with costs.

Seshagiri Aiyar, J.—[After setting out the facts as reported at p. 308 *supra.*] The first question for determination is whether under Exhibit B Kundana Devi can make a second adoption. The genuineness of the document is not in question. It does not specify any particular individual as the boy to be adopted and it imposes no other restrictions. It was rightly conceded by Mr. S. Srinivasa Aiyangar, the learned vakil for the respondent that the use of the words *a son*, was not intended to be restrictive of the number: Similar words were held to authorise successive adoptions. (Vide *Rani Dharam Kunwar* v. *Balwant Singh* [2].) It was argued however, that Adikonda could never have contemplated the death of the first adopted son and the necessity for a second adoption, and therefore the document should not be construed as conferring such a power. The canon of construction regarding powers to adopt is not different from that of ordinary testamentary dispositions; the intention of the testator has to be gathered from the language employed by him and from the circumstances existing at the time of the grant of the power. If Adikonda was capable of looking far ahead, I am prepared to hold that he contemplated that his brother Raghunada Deo and his descendants should not succeed to the Zamindari under any circumstance. In the earlier litigation it is pointed out by Sir James Colville delivering the judgment of the Judicial Committee (*Sri Raghunada* v. *Sri Brojokishore*, [3]) that the brothers "were long on bad terms with each other......... ....the strife was embittered by subsequent quarrels between

1. (1911) 22 M. L. J. 85. 2 (1912) L.R. 39 I. A. 142.
3. (1876) L.R. 3 I.A. at 177.

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the brothers and by the desperate attempt of Raghunada as late as 1852 to oust his brother by proving him to be illegitimate." The judgment goes on to say " that Adikonda would desire to retain by all means in his power the *Zamindari* in his own line." If, therefore, it is permissible to speculate upon what Adikonda would have desired in case his adopted son died, the probabilities are that he intended his widow to make a second adoption if the law permitted her to do so. (See *Bhagawath Pershad* v. *Murari Lall.* [1]) It is clear that Adikonda was anxious that he should have a son " worthy of his throne."; and the fact that the authority was given at a time when his wife was pregnant accentuates the position that his intention was that his line should be continued by an adopted son in case his wife gave birth to a female child. The case is covered by the decision of the Judicial Committee in *Suryanarayana* v. *Venkataramana* [2]. The learned vakil for the respondent contended that the authority given to the widow in that case was more general and comprehensive in its terms than is contained in Exhibit B. But the principle enunciated in that decision applies with equal force to this case: Their Lordships of the Judicial Committee have indicated that the authority given by a Hindu husband to his wife should be regarded as being general in its nature, unless conditions have been imposed or limitations placed upon it by him. At page 387, Their Lordships say that they are unable to attach much weight to the opinion of Sir William Macnaughten to the effect that a second adoption is invalid. This disapproval is based on the fact that Sir William Macnaughten ignored the opinion of the pandit and did not quote any precedents for his conclusion. The Vyavastha of the pandit which is cited with approval expressly says that as " the deed put in does not restrict the adoption to one son only " another may be adopted : the view of the learned Judge who decided *Suryanarayana* v. *Venkataramana* [2], which was confirmed in *Suryanarayana* v. *Venkataramana* [3], is in entire accordance with the dictum of the pandit. *Bhagawat Pershad* v. *Murari Lall* [1] and *Rani Dharam Kunwar* v. *Balwant Singh* [4] also proceed on the same ground. I am therefore of opinion that Exhibit B did confer a power to make a second

1. (1910) 15 C.W.N. 524.
2. (1902) I.L.R. 26 M. 681.
3. (1906) I.L.R. 29 M. 382.
4. (1912) L.R. 39 I. A. 142.

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adoption. The learned District Judge's conclusion to the contrary is largely based upon two considerations (1) that no question of spiritual benefit could have been in the contemplation of Adikonda, as it was customary in Uriya Zamindari families to appoint a Brahmin priest to conduct the funeral ceremonies of the deceased and to perform his annual Sradhas; and (2) that as the adopted son lived to the age of 36 years the spiritual cravings of the deceased must have been fully satisfied. It is true that a priest known by the appellation of the *Puo Brahmin* is generally appointed by these Zamindars to perform their obsequies and Sradhas. He also takes the gotram of the deceased. It is impossible to argue from this that this hired priest exhausts all the spiritual benefits which a son is expected to confer upon a Hindu father. The performance of these two ceremonies is not the only object of having a son: I have no desire to discuss at any length the religious precepts relating to this question.

Extracts from the smritis and from the Mahabarata bearing on this subject are collected in Sarcar's Vyavastha Darpana, Chapter IX. These however do not exhaust the materials—but they are fairly representative of the shastraic injunctions on the subject. A Hindu father desires a son in order that he may discharge his obligations to his ancestors, to his creditors and to the Gods. A *Puo Brahmin* can discharge only a small portion of the first function. The debt to the Gods which the smritis and the Vedas speak of as being incumbent upon the son to discharge consists not only in the worship of the family Gods, but also in the performance of good and pious acts......building and endowing temples, going on pilgrimage, feeding the poor, relieving the needy and the distressed, the digging of tanks, etc., the appointed priest is not expected to perform any of these duties, nor can he pay the debts of the deceased. The idea that the Po Brahmin can be a substitute for a son is altogether foreign to Hindu notions. The second objection must now be taken to have been set at rest by Their Lordships of the Judicial Committee endorsing the considered opinion of Romesh Chunder Mitter in *Ram Soonder Singh* v. *Surbanee Dossee* [1]. It is enough to say that that view is fully supported by the statement of sage Yagnavalkya, an authority paramount in this Presidency who

1. (1874) 22 W. R. 121.

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says "the attainment of worlds, Immortality and Heaven depend on a son, grandson and great grandson." That a son who lived for 36 years must be taken to have satisfied this craving for three generations of descendants can find no support in Hindu Theology. I have therefore come to the conclusion that the authority conferred by Exhibit B should not be construed as restrictive of the powers of Kundana Devi to make a second adoption.

The next question is whether the fact that the plaintiff was adopted to Adikonda who was not the last male holder and after the zamindari had vested in Vaishnava Deo and his son successively invalidates the adoption. The only limitation placed by the text writers on the power to adopt is that "the man should be destitute of a son:" the word son has been construed in the Dattaka Mimamsa (Section 1, paragraph 13) following a text of Manu, to include a grandson and a great grandson of course there is the obvious limitation of the death of the donee of the power. She cannot delegate. These are the only qualifications which the ancient lawgivers have recognised: but the courts have from considerations of expediency imposed further restrictions on the exercise of the power to adopt. They are attributable to a desire that property should not be divested frequently and capriciously; and are the outgrowth of ideas tending to the preservation of peace and quieting of title. Such being, according to my opinion, the principle of Judicial pronouncements relating to the divesting of property, I consider that it will not advance justice, to crystallise them into inflexible and rigid rules, and then to endeavour to engraft exceptions on them: I shall presently examine the decisions bearing on this question. Before doing so it is necessary to state that the term "*vesting of property*" as applied to a Mitakshara joint family is liable to be misunderstood: all that is connoted by the phrase is that in the absence of preferential heirs, the presumptive heir is entitled to possession of the estate without prejudice to the rights of others which may accrue at some future time. He takes the surviving interest conditionally. (See *Krishna* v. *Sami*[1] and per Russell J. in *Bachoo* v. *Mankorebai*[2]). He gets no absolute property in it. In Hindu law property cannot be in abeyance but must vest in some one; but the intermediate holder is not to be regarded as

1. (1885) I. L. R. 9 M. 64. 2. (1904) I. L. R. 29 B. 51.

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the absolute owner of the property : If this view of the position of the person who takes possession pending further development is kept in mind there will not be much difficulty in reconciling the various rulings upon the point.

Mr. K. Srinivasa Aiyangar contends that the rules suggested by Mr. Mayne in paragraph 191 are not applicable to families living in co-parcenary under the Mitakshara System of law. I think the contention is well-founded: The paragraph in question has a marginal note " Bengal Decisions" and the rules themselves are obviously inapplicable to joint property. The reference to Madras decisions is explainable on the ground that they relate to separate property obtained by inheritance. The authorities bearing on the question may be considered under two heads. Those relating to separate property and to inheritance proper: and those dealing with co-parcenary property and to survivorship. *Mussumat Bhuban Moyee Debia* v. *Rama Kishore Acharj Chowdri* [1] and *Sri Raghunada* v. *Sri Brojo Kishore*[2] represent the two classes. It will be convenient before proceeding further, to deal with the argument of Mr. S. Srinivasa Aiyangar that the distinction between survivorship and inheritance is arbitrary and that the decided cases lead to the conclusion that joint Hindu family property is really taken by inheritance. He has drawn our attention to stray observations in some of the judgments of the various High Courts; *Krishna* v. *Sami* [3], *Surendra Nundan* alias *Gyanendra Nandan Das* v. *Sailaja Kant Das Mahapatra* [4] *Bachoo* v. *Mankorebai* [5]. It has often been pointed out that sentences should not be detached from the main context and quoted as precedents. I do not think the quotations themselves bear the interpretation placed upon them by the learned vakil. He made a further point that whether survivorship is the rule of law in joint Hindu families or not, it is not so in the case of impartible Zamindaries. The course of decisions in this presidency has established that the heir to a Zamindari is to be found by regarding the estate as co-parcenary family property; See *Rajah of Kalahasti* v. *Achigadu* [6], *Zamindar of Karvetnagar* v. *Trustee of Triumalai, Tirupati, etc., Devastanams* [7], *Maharaja*

1. (1865) 10 M. I. A. 279.
2. (1876) L. R. 3 I. A. 174
3. (1885) I.L.R. 9 M. 64 at pp. 67 & 77
4. (1891) I.L.R. 18 C. 385 at pp. 395 & 397.
5. (1904) I.L.R. 29 B. 51 at 58.
6. (1905) I.L.R. 30 M. 454.
7. (1909) I.L.R. 32 M. 429.

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of Bobbili v. *Zamindar of Chundi* [1], and *Tirumal Rao Sahib* v. *Rangadani Rao Sahib* [2]. It is true as pointed out by Mr. S. Srinivasa Aiyangar that in S. 2, Sub-clauses 2 and 3 of the Madras Impartible Estates Act (II of 1904), the successor is spoken of as the heir: it does not follow therefrom that he takes by inheritance. S. 4 of the Act introduces practically the same restrictions upon the power of the proprietor of the estate to make alienations as fetter the acts of the managing member of a joint Hindu family. The law has thus practically been brought into conformity with the estate of affairs which existed before the decision of the Judicial Committee of the Privy Council in the Mahuli alienation case *Sartaj Kuari* v. *Deo Raj Kuari* [3]. It is true that the zemindari in the hands of the successor has been decided to be assets for the purpose of enabling the decree-holder to proceed against it for the realisation of the amount due to him; to this extent, there is a divergence from the normal rule applicable to a joint Hindu family. On the other hand, every incident which attaches to survivorship exists either by virtue of legislation or by judicial pronouncements in an impartible estate. I, therefore, see no reason to hold that the Zemindari of Chinnakimidiis not governed by the rule of survivorship relating to joint family property.

Turning now to the two classes of cases mentioned by me, I shall first deal with those relating to co-parcenary property. The decision in *Sri Raghunatha* v. *Sri Brojo Kishore* [4], does not directly bear upon the question; but it is authority for the position that even when the estate had vested in a male owner who was capable of transmitting it to his heirs in full proprietary right the adoptee was entitled to divest such person. The next case is the Guntur case reported in *Vellanki Venkata Krishna Rao* v. *Venkata Rama Lakshmi* [5]. In that case, the property vested in the first adopted son who died an infant and unmarried. The mother succeeded and made a second adoption. This was upheld by the Privy Council. The theory that the adoption should be to the last male holder fails in this case.

1. (1910) I.L.R. 35 M. 108.
2. (1912) 23 M.L.J. 79.
3. (1888) I.L.R. 10 A. 272. (P.C.)
4. (1876) L. R. 3 I.A. 174.
5. (1876) 4 I. A. 1.

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The case in *Suryanarayana* v. *Venkataramana* [1] illustrates the same position; the first adopted son lived for over 10 years: it was held that the mother was competent to make a second adoption. Here again, the theory that the adoption should be to the last male holders falls to the ground. In *Bachoo-Harkissen Das* v. *Mankore Bai* [2], there were two brothers, one of them died while his wife was pregnant. The surviving brother gave power to his wife to adopt and died. The adoption was made after a son was born to the pre-deceased brother. Overruling the contention that the case in *Mussumat Bhoobun Moyee Debia* v. *Ram Kishore Acharj Chowdhry* [3] applied, it was held that the adoption conferred title to the estate of his adoptive father.

The case in *Rani Dharum Kunwar* v. *Balwant Singh* [4] is the last of the Privy Council rulings on the question. In that case during the pregnancy of the wife, power to make successive adoptions was given: a male child was born but died soon. Two adoptions followed in quick succession; both the adoptees died, a third adoption was made, but was questioned by the adopting widow herself as being invalid; the decision itself was based upon the principle of estoppel as against the widow; but their Lordships take care to say that the adoption was otherwise valid and binding. In page 148, there is this observation: "Of course, the estoppel pleaded against the Rani must be taken as purely personal. It does not bind any one who claims by an independent title, but, in view, of the decision now given, that the respondent was, in fact, duly adopted, further ligitation on the point may be taken as happily out of the question.

These decisions of the Privy Council are consistent only with the principle that the theory that the adoption should be made to the last male holder does not apply to joint Hindu families living in co-parcenary; I shall very briefly deal with the decisions of the High Courts. In *Venkatappa Bapu* v. *Jivaji Krishna* [5], it was held that where the mother succeeded after the death of the son's widow, the adoption was valid. In *Surendra Nandan* alias *Gyanendra Nandan Das* v. *Sailaju Kant Das Mahapatra* [6] an

1. (1906) I. L. R. 29 M. 382.
2. (1907) L. R. 34 I.A. 107. S. C. I. L. R. 31 B. 373.
3. (1864) 10 M.I.A. 279.
4. ( ) L. R. 39 I.A. 142.
5. (1900) I. L. R. 25 B. 306.
6. (1891) I. L. R. 18 C. 385.

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adoption by a predeceased brother's widow was held good. The same principle was applied where property had vested in a member of a joint family to the exclusion of a disqualified member of that family. It was held that the son of this disqualified person succeeded to his share in the joint family property. 9 Mad. 64. These decisions show that the *last male holder's* theory is inapplicable to joint Hindu families.

On the other hand, it is now settled law that where property had passed by inheritance and had vested in a full owner, subsequent adoptions would not divest his property, Booban Moyee's case decides this explicitly and has been followed in *Pudma Coomari Debi* v. *Court of Wards* [1]; *Bhubaneswari Debi* v. *Nilkomul Lahiri* [2]; *Thayammal and Kuttisamy Aiyan* v. *Venkatarama Aiyan* [3] and in *Ratna Mudaliar* v. *Raghunadha Mudaliar*. [4] The head note in the last case is incorrect. The case was one of inheritance and not of survivorship. These are all cases really of collateral succession. Where property is taken by inheritance there is no equity by which it can be divested in favour of a person who had no claim on the inheritance. To this class of cases, the rules enunciated by Mr. Mayne will apply; and I feel no doubt that it was never the intention of that learned writer to formulate a set of rules applicable to joint and separate properties alike. Mr. S. Srinivasa Aiyangar pressed upon our attention the case decided by the learned Chief Justice and Mr. Justice Phillips *Sivagnana Servaigarar* v. *Ramasawmy Chettiar* [5] In that case the question was whether an adopted son can question the alienation made by a person in whom the property had vested prior to the adoption. It was held that the intermediate holder was not in the position of a trespasser: The learned Chief Justice points out at page 93 that the language of the judgment in *Mussumat Bhoobhun Moyee Debia* v. *Ram Kishore Acharj Chowdhry* [6] is not appropriate to a case of survivorship: Without giving any decision on the point, his Lordship indicates that the weight of authority is in favour of applying that decision to joint Hindu families; no final conclusion was arrived at, because it was not necessary for the decision of the case: and I do not think that case helps the respondent. The

1. (1881) 8. I. A. 229.
2. (1885) L. R. 12 I. A. 137.
3. (1887) L. R 14 I. A. 67 S.C. I.L.R. 10 M. 205.
4. (1898) 8 M. L. J. 173.
5. (1911) 22 M. L. J. 85.
6. (1865) 10 M. I. A. 279,

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learned Vakil for the respondent invited our attention to the rulings in 14 Bombay 463, *Krishnarav* v. *Shankarav* [1] *Manikyo Mala Bose* v. *Nand Kumar Bose*[2] and *Adivi Surya Prakasa Rao* v. *Nidamarti Gangaraju* [2]; it is not necessary to discuss the question considered in these rulings especially in the Bombay cases, as to whether a co-parcenary comes to an end when there are no male members in the family and that the property then passes to the widow of the surviving member of the joint Hindu family by inheritance. The learned Judges seem to regard the joint family as a *quasi* corporation which loses this character by the death of the last male member. Whether this position is correct or not, these cases cannot afford any assistance in deciding the question before us.

I have examined the authorities at some length, and my conclusion is that the estate taken by survivorship by a member of the joint Hindu family is a conditional estate subject to defeasance on the coming into existence by adoption or otherwise of a new member into the co-parcenary, that the rule of law that in order that an estate once vested may be divested the adoption should be made to the last male holder is not applicable to co-parcenary property, and that an impartible Zamindari is joint family property subject to an exception.

There remains yet another question and that is whether the existence of Ratnamala, the widow of Brojokishore is a bar to the adoption made by Kundana Devi. Mr. K. Srinivasa Aiyangar argues that the only limit to the power to adopt is that mentioned in the text of Dattaka Mimamsa already quoted; it is true that the legislature has fixed no period of limitation and as pointed out in *Mutasaddi Lal* v. *Kundan Lal* [4], there is no limit of time within which an adoption should be made. First adoptions made long after the granting of the authority have been upheld on this ground. See also Mayne, paragraph 154 and the cases cited at the footnote; our attention has been drawn by the learned Vakil for the respondent to the case in *Rama Krishna* v. *Shamrao* [5] where *Justice Chandravarkar* in delivering the opinion of the full Bench says where a Hindu dies leaving a widow and a son and that son dies leaving a natural

1. (1892) I. L. R. 17 B. 164.
2. (1906) I. L. R. 33 C 1906.
3. (1908) I. L. R. 33 M. 228.
4. (1902) I. L. R. 26 B. 526.
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born or adopted son or leaving no son but his own widow to continue the line by means of adoption, the power of the former widow is extinguished and can never afterwards be revived." It is not easy to trace the origin of this rule; it is stated in some of the decided cases that the law does not favour an unlimited user of the power to adopt; although the power to adopt must receive a liberal interpretation, it is not, in my opinion, inconsistent with this principle that some limitation should be placed on the donee of the power. Law does not favour constant interruptions with possession; and it is desirable that some rule of equity should be enforced against permitting successive adoptions. In the present case, Brojo Kishore was 36 years of age when he died. He had no male issue at the time of his death. He made no adoption himself. As his widow Ratnamala is not a party to this litigation, we are not in a position to say whether he has authorised her to make an adoption; nor can we assert that this lady is not in a position to make an adoption. If she adopts, the plaintiff, as admitted by the learned Vakil for the appellant can have no claim to the estate; where the exercise of a power to make a second adoption will not result in creating a new line of succession but will only transfer the estate from one intermediate owner to another with the prospect of the latter being eventually divested, the courts might well lay down that the limit of the power to adopt has been reached; Mr. Justice Chandravarkar has taken this view and I find he is supported by authorities; West and Buhler 984 and 985, *Payapa* v. *Appanna* [1], *Thayammal* v. *Venkatarama* [2] *Amulya Charan Seal* v. *Kali Das Sen* [3]. It is true that in these latter cases, the property vested in the son's widow. In the present case the property does not vest either in the mother-in-law or in the daughter-in-law. I do not think this fact can affect the principle that where a person is in existence who is competent to adopt a boy in whom the full proprietary right will vest, that must be taken to be the time of the exercise of the power by the donee to make successive adoptions. I have therefore come to the conclusion, though not without hesitation, that the power of Kundana Devi to make a second adoption is not exercisable under the circumstances of this case. It is upon this ground alone that I hold that the appeal fails; I agree in dismissing it with costs.

1. (1898) I. L. R. 23 B. 327 2. (1887) I. L. R. 10 M. 205 (P.C.)
3. (1905) I. L. R. 32 C. 861

Ramanuja Aiyangar v. Satagopachariar.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Sir Charles Arnold White, Chief Justice and Mr. Justice Seshagiri Aiyar.

Gomatham Ramanuja Aiyangar and another ... *Appellants* * (*Plaintiffs*).

v.

Satagopachariar and others ... *Respondents* (*Defendants*).

Hindu Law—Will in favour of females—Construction—Nature of estate—Limited or absolute estate—Grant to a male and female by the same clause—Use of same words for charity—Inference of absolute estate to all.

Per White C. J.—The presumption or rule of construction that under a Hindu will where the testator devises or bequeaths property to a female the intention is that she should take only a life estate does not apply to a case where from the will as a whole the intention is clear that she should take an absolute estate.

Per Seshagiri Aiyar, J.—Where the words of gift are capable of conferring an absolute estate, it cannot be cut down simply because the devisee is a female, *Sambasiva Aiyar* v. *Venkataswara Aiyar* (1) referred to.

Tendency towards a more liberal construction in case of grants to women referred to.

Where a testator devised property by one single clause to his brother's daughter and a niece's son who were to take as tenants in common, and the same expression was used when giving property to a charity. *Held* that the proper inference was that the same kind of estate was conferred on all the legatees and all of them took absolutely.

Appeal from the decree of the District Court of North Arcot in O. S. No. 16 of 1907. The facts are sufficiently set forth in the Chief Justice's Judgment. The terms of the will are as follows.

" The will executed on 9th November 1857 corresponding to 26 Alpisi of Pingala year by Seshaiengar.

As the patta relating to some of the lands of nanjai, punjai and thottakkal in the said village etc., and the appointment of village munsif Maniyam have been registered in my name, in Government and as there is no male issue to me to look after these, particulars of the land granted away to Kanam my wife and Tiruvengadammal my daughter.........those granted away to my elder brother Kuppaniengar's eldest daughter Venkataraghavammal.........

Those granted away to Amirthammal the eldest daughter of Rangammal the wife of the said Kuppaniengar and to Ragavacharia, son of the deceased Mangathaiammal who etc. The respective persons should get respective pattas issued in their

*A. No. 126 of 1909. 9th April, 1914.

1. (1907) I. L. R. 31 M. 179.

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names in respect of these lands according to the conditions laid down above, and should enjoy, etc. This is the will executed with my free consent."

C.V. Ananthakrishna Aiyar for Appellants.

M. O Parthasarathi Aiyangar and *S Gopalaswami Aiyangar* for Respondents.

The Court delivered the following

Judgments :—*The Chief Justice*: The only question which has been raised on this appeal is as to the nature of the estate to be taken by a lady called Amirthammal in certain lands devised to her by a will executed by her uncle. The learned Judge of the Court below has held that she takes an absolute estate in this property. Mr. Ananthakrishna Aiyar on behalf of the appellants has contended that she only takes a life estate.

There are no doubt, decisions—of which the case reported in *Seshayya* v. *Narasamma* 1, is one which proceed upon a rule of construction, or a presumption that where a Hindu testator devises or bequeaths property to a daughter or wife—(one of the beneficiaries under the will in the 22 Madras case was the daughter-in-law), the intention is that the female should only take the estate which she would have taken if she could have claimed title to the property otherwise than under the will. It seems doubtful whether this canon of construction or presumption would be applicable to the facts of the present case, because under the will in question Amirthammal who is the niece of the testator, the testator being her father's brother, could have no title to the property in question, apart from the will. If there were no will she would take nothing.

It is scarcely necessary to observe that this rule of construction or the presumption, to which I have referred is only intended to assist the Court in giving effect to the intention of the testator and that if a will, read as a whole indicates that it was the intention of the testator that the female in whose favour the devise or bequest was made should take an absolute estate therein, the rule of construction or presumption, whichever we like to call it, has no application.

Now, what are the provisions of this will? The testator devises certain land to his wife and to his daughter; under this devise the wife and the daughter take the land in question as

1. (1899) I. L. R. 22 M. 357.

tenants-in-common. There is a further devise of other lands to his elder brother's eldest daughter. Then there is a devise to Amirthammal who is another niece of the testator and the son of another niece. These two also take as tenants-in-common. Then we have a devise to an idol. Now the words of disposition with reference to all these devises are the same and they are translated in the will as " granted away."

Mr. Ananthakrishna Aiyar has been driven to contend, in view of a decision of this court reported in *Sambasiva Aiyar* v. *Venkateswara Aiyar* [1], that the effects of the devise to Amirthammal and the son of another niece is to give a life estate to Amirthammal and the son of the other niece. In the case reported in 31 Madras to which I have referred the words of gift were the same.

There were two donees: one was a male and the other was a female and we held that the effect of the gift was to give the woman the same estate as to the man, namely the full estate. Mr. Ananthakrishna Aiyar has had to carry the matter a step further and to contend that the words of the gift being the same and there being two donees, one a woman and the other a man, the effect of the will is to give the man the same estate as the woman, namely, a restricted estate. That seems to me to be obviously contrary to the intention of the testator. The effect of the will according to Mr. Ananthakrishnier's contention is to create a number of life estates no provision being made as to what was to happen when those life estates came to an end. I think that is clearly contrary to the intention of the testator. We have been referred to a recent Privy Council decision *Radha Prasad Mullick* v. *Raneemani Dassi* [2]. There the Privy Council reversing the decision of the Calcutta High Court, no doubt held that under the will the female took a limited estate. But they arrive at the conclusion after considering the provisions of the Will read as a whole and they come to that conclusion because they think the Will, read as a whole indicates that it was the intention of the testator that the woman in that case should take nothing more than a restricted estate. Their Lordships observe:—" No language could more clearly show that the intention of the testator was to exclude his

1. (1907) I. L. R. 31 M. 179. 2. (1908) I. L. R. 35 C. 896. (P. C.)

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daughter's daughters from the succession, to which they would have been entitled under the ordinary Hindu Law if their mother's estate had been absolute."

This question has come before this court quite recently on one or two occasions and has been dealt with in judgments to which my learned brother was a party. In one of these cases the learned Judges make this observation:—They say "There is no presumption of law that a gift by a man to his widowed daughter-in-law is only the gift of a life estate, as whatever might have been the tendency of certain earlier decisions it has been held in more recent cases that documents of gift to daughters or other female members of a Hindu family need not be construed with a bias in favour of the view that an absolute interest could not have been intended to be transferred." I agree with those observations. Mr. Ananthakrishna Aiyar suggested that this will was a will of 1857 and that in construing it we ought to apply the rule of construction which he suggests would have been applicable in 1857. I am not at all sure that the rule of construction which he asks us to apply would have been applied by the Courts in 1857. But however that may be, it seems to me that in construing the will, the fact that the will is an old will does not prevent us from applying to this what seems to me to be the real test, namely, what was the intention of the testator? I think the learned Judge was right in the view he took as to the construction of the will and I would dismiss the appeal with costs.

Seshagiri Aiyar J:—I entirely agree with my Lord. The rule of construction enunciated in *Seshayya* v. *Narasamma* [1] must greatly qualified having regard to the tendency of the more recent decisions of the Privy Council and of the various High Courts. The true principle seems to me to be that, where the words of a gift are capable of conferring an absolute estate on a person the fact that that person is a female will not derogate from the point. In the present case there are four considerations which lead me to conclude that the testator intended to convey an absolute estate in favour of Amirthammal. In the first place the words used in

1. (1899) I. L. R. 22. M. 257.

the vernacular disposing of the property in favour of Amirthammal when translated, would mean "assigned to her."

Those words convey an absolute estate. Secondly the disposition in favour of Amirthammal happens to be coupled with a gift in favour of a male. It is a strong circumstance indicating that both the male and the female were intended to take the same kind of estate in the property. This was pointed out by the learned Chief Justice in the case of *Sambasiva Aiyar* v. *Venkateswara Aiyar* 1 ; there is no room for the suggestion that ordinarily when property is given to a male he takes other than an absolute estate, and when a female is given an estate along with a male, she should be given the same estate as would go to a male. Another circumstance is that there is a bequest in this will to a charity and I do not think that by any stretch of imagination it can be argued that that gift was intended to confer a limited estate. The words employed in conveying the property to the charity are exactly the same as those employed in conveying the property to Amirthammal. And the fourth circumstance is that this is a gift in favour of a lady who had, no claim upon the testator. She was practically a stranger entitled neither to inheritance nor to maintenance and that is a strong circumstance which shows that the testator did not intend to confer upon this lady a qualified estate which might be presumed to have been his intention in case a female who was an heir under the Hindu Law was intended to be benefitted by the gift. For all these reasons I agree with the learned Chief Justice in thinking that the District Judge arrived at a right conclusion and that the appeal should be dismissed with costs.

PRIVY COUNCIL.

Present:—Lords Moulton and Parker of Waddington Sir John Edge and Mr. Ameer Ali.

[On appeal from the Court of the Judicial Commissioner, Central Provinces.]

Ramchandra Martanda Waikar and others ... *Appellants**

v.

Vinayak Venkatesh Kothekar and another .. *Respondents.*

Hindu Law—Mitakshara School—Inheritance—Sapinda—Bhinna Gotra Sapinda—Fifth degree from the propositus—Mutuality of sapindaship, essential—

* 29th June, 1914.

1 (1907) I. L. R. 31 M. 179.

Ramchandra Martanda Waikar v. Vinayak Venkatesh.

Principles of construction—Classes of heritable relationships—Addition to, if permissible—Sapindaship—Meaning of—Crown—Rights of against relations beyond five degrees.

Held, that the Sapinda relationship (according to the Mitakshara school) on which the heritable rights of collaterals is founded, ceases in the case of Bhinnagotra Sapindas with the fifth degree from the propositus and that in order to entitle a man to succeed to the inheritance of another he must be so related to the latter that they are sapindas of each other.

Gridharilal Roy v. *The Govt. of Bengal* (1) which laid down that the enumeration of bandhus was not exhaustive but merely illustrative does not warrant the contention that the classes specified by Vijnaneswara can be added to. (Their Lordships express no opinion on the point).

Quaere if the Crown can succeed against persons related beyond five degrees through females.

The Hindu law contains its own principles of exposition and questions arising under it cannot be determined by abstract reasoning or analogies borrowed from other systems of law but must depend for their decision on the rules and doctrines enunciated by its own lawgivers and recognised expounders.

Sapinda relationship on which the right of inheritance is founded under the Mitakshara means consanguinity in a distinct legal sense as explained by the author in the Achara Kanda.

Authorities on Hindu Law reviewed, *Babu Lall* v. *Nankuram* (2), *Umaid Bahadur* v. *Udai Chand* (3), *Lullubhai* v. *Nankuvarbhai* (4), Mayne's Hindu Law, West and Buhler's Digest of Hiudu Law Vol. 1 p. 119, 120, Sarvadhikari's Tagore Law Lectures, Shastri Golap Chunder Sarkar's's translation of Viramitrodaya, Rao Vishwanath Mandlik's translation of Yajnavalkya, Commentary on Hindu Law by J. N. Bhatracharya referred to.

Appeal from a judgment and decree of the Court of the Judicial Commissioner, dated March 23, 1910, affirming a judgment and decree of the Court of the District Judge of Balaghat, dated February 26, 1907.

One Luxman Rao, died in or about 1851 leaving Jankibai his widow and Chitkoobai his daughter as heirs. Jankibai succeeded to the entire property and was in turn succeeded by Chitkoobai in 1883. She died in 1894 leaving no issue and her husband Vinayak Rao came into possession of the property and adopted Venkatesh, both of whom were made defendants in the suit. The appellants claimed the property as bandhus of Timaji Pant, the common male ancestor but were six degrees removed instead of the recognized five degrees for bandhus *ex parte* materna. The defendants (respondents) contended that the family was of Mahratta origin governed

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1. (1868) 12 M. I. A. 448.

2. (1894) I. L. R. 22 Cal. 339.

3. (1880) I. L. R. 6 Cal. 119.

4. (1876) I.L.R. 2 B. 388 ; s. c. on appeal. (1880) L.R. 7 I.A. 212.

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by the Maharashtra law wherein daughters took an absolute estate. Whereas the appellants urged that the family to which they and the said Lakshman Rao belonged was governed by the Benares School of the Mitakshara Law by which a daughter took only a limited estate ; that on her death the property would devolve on Lakshman Rao's heirs. The District Judge held that the plaintiffs were not heritable Bhandus being six degrees removed from the common ancestor and that they could not inherit the estate in dispute. The Court of the Judicial Commissioner affirmed the findings against which an appeal was preferred to His Majesty in Council.

De Gruyther K. C. with him *Parikh* for the appellants contended that under the Mitakshara Law the limit of the Sapinda relationship *ex parte materna* was seven degrees and that the appellants were entitled to succeed as *matri—bandhu*, their mother being within five degrees as in the Acharkanda of the Mitakshara for the purposes of marriage. The word 'Sapinda' is used in a generic sense for purposes of inheritance and means a blood relation. It is also used in a specific sense as for instance in the case of marriage, impurity at death, etc.. In the text of Manu "To the nearest Sapinda" the word is Vignaneswara understands it as relation. Rules of succession under the Dayabhaga system are based on funeral oblations. Under the Mitakshara it is different. The power to offer oblations is not the test. The doctrine of mutuality of Sapindaship is not warranted by the Achara Kanda. If Sapinda means blood relations all Sapindaship will be mutual.

[*Mr. Ameer Ali* :—You say there is no limitation to the word Sapinda. Term Sapinda means blood and blood relations only].

[*Lord Moulton*:—In the Courts below both parties took it for granted that some limitation to Sapindaship should be applied]. A Sapinda for one purpose was not necessarily a sapinda for another e.g., sapindaship for adoption extended to seven degrees in adoptor's family. It had different meaning for different purposes. All Sanskrit writers had differently used the word Sapinda. You cannot apply the principle of prohibited degrees of relationship to inheritance, as in that case son would succeed and father would not. [Mandlik's Mayukha and Yajnavalkya].

In Viramitrodaya chap. 3; part 7, Secs. 4, 5 and 6 which was regarded authoritative on the Hindu law in 12 M. I. A. 466

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supported by Mitakshara, ch. 2, Sec. 6, para 2, the same was laid down *re* bandhu.

[*Mr. Ameer Ali*:—Your argument is that your client does not come under the classes that are mentioned in text books but you wish it to be extended on the ground that the Privy Council has done so in several cases].

Lord Moulton:—Limitation may not be reversible, you say whatever may be the limitation it may be reversible.

There must be some limit of determination other than prohibited degree. *Umaid Bahadur* v. *Udai Chand* [1], was no authority for applying prohibited degree.

[*Mr. Ameer Ali*:—There must be mutuality in inheritance, you have made out that authors are not against you] Golap Chunder Shastri had clearly enunciated the law that when inheritance was claimed through a mother Sapinda relationship extended to seven degrees or at least to six degrees. Apararka, a commentator on the Yajnavalkya, supported the view of Mitakshara that in the case of females too Sapindaship extended to six degrees.

Reference was made to Mitaksbara, ch. 1 and 2, Secs. 1 and 3, para 5, 4, Sec. 5, para 2, 6, Mandlik's Hindu Law P. 169 ch. Gotra, Shama Charan Sarkar's Vyavastha Chandrika P. 192 Viramitrodaya, ch. 3, part 7, secs. 4, 5, 6. West and Buhler's Digest of Hindu Law, P. 12, Mayne's Hindu Law, P. 683, 685. Ghosh's Hindu Law P. 53 Golap Chandra Shastri Hindu Law P. 74, 76, 291—6 *Umaid Bahadur* v. *Udai Chand* [1], *Babu Lal* v. *Nankuram* [2], *Lullubhai* v. *Mankuvarbhai* [3], *Girdhari Lall* v. *Govt. of Bengal*[4] *Morley's Dig. pp.* 201, 205, *Venkatagiri* v. *Chanden* [5].

Ross K. C. and Lowndes for the respondents contended that the appellants were not heirs of Laxman Rao, according to the Hindu Law. A Sapinda of the propositus to be capable of inheritance, must satisfy a further condition, *viz.*, that he must be so related to the propositus that the latter was also his sapinda either directly or through the father or the mother. There must be mutuality between the propositus and the heritable Sapinda. This was laid down in Manu ch. IX, 187 cited in Mitakshra Ch. II Sec 3 as interpreted by Balambhatta and Viresarbhatta. The relationship by Sapindaship as given by Vijnaneswara and Nilakanta was the same for inheritance as for marriage. It had been so regarded in West and Buhler, p. 434 which also laid down (Vol. 1) that in the mother's line Sapindaship ceased with the fifth person. The same was mentioned in Sarvadhikari's Tagore Law Lectures 1884 p. 702.

1. (1880) I. L. R. 6 Cal. 119. (F.B.) 2. (1894) I. L. R. 22 Cal. 339.340, 131.
3. (1876) I. L. R. 2 Bom. 388,423, 426. 4. (1868) M. I. A. 445.
5. (1899) I. L. R. 23 M. 123.

Reference was made to Manu ch. 9 Verse 153, ch. 3 Verse 216. West and Buhler, 121, 488-9, Jolly's lectures, Mitakshara ch. 2 Sec. 1 Verse 6, Sec. 2 Verse 6. *Umaid Bahadur* v. *Udai Chand*[1] *Babu Lal* v. *Nankuram*[2] *Lallubhai* v. *Mankuvarbai*[3] *Bhyah Ram Singh* v. *Bhaiyah Ugur Singh*[4].

De Gruyther in reply.

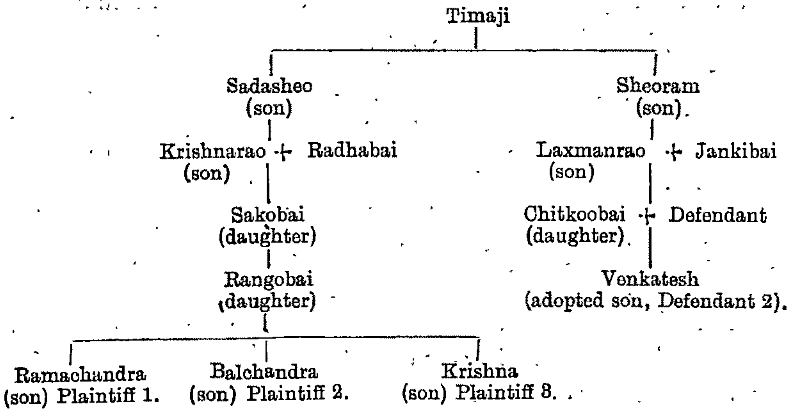
The judgment of their Lordships was delivered by

Mr. Ameer Ali. The suit that has given rise to the present Appeal was brought by the plaintiffs in the Court of the District Judge of Balaghat, in the Central Provinces of India, for possession of certain properties which originally belonged to one Laxmanrao, whose next-of-kin or *bandhus* they claim to be under the law of the *Mitakshara.*

Laxamanrao died in 1851, leaving him surviving his widow Jankibai and a daughter Chitkoobai, both since deceased. The defendant Venkatesh is Chitkoobai's husband. On Laxmanrao's death without male issue his inheritance devolved on Jankibai. She held possession of the properties in suit as a Hindu widow until her death in 1883, when Chitkoobai succeeded to her fathers's estate. She died on the 7th of May 1894, leaving the first defendant, her husband. The second defendant is a son adopted by him after Chitkoobai's decease.

The present action was not instituted until March 1906. The plaintiff's claim that the inheritance to Laxamanrao opened to them on the death of Chitkoobai, and that they are entitled to recover possession of the properties from the defendants who have no right of succession to Laxmanrao's estate.

The following genealogical table will explain the relative position of the parties and the exact nature of the claim :—



1. (1880) I.L.R. 6 Cal. 119.
2. (1894) I.L.R. 22 Cal. 339.
3. (1876) I.L.R. 2 B. 388, 426, 427.
4. (1870) 13 M.I.A. 373, 380.

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The defendants resisted the claim mainly on two grounds; they alleged, *firstly*, that the ancestors of the parties had migrated to the Central Provinces from Asirgarh, situated within the Mahratta Country, where the law in force conferred on the daughter succeeding to her father's inheritance an absolute estate descendible to her own heirs; that the family of Timaji was still subject to that law, and that accordingly the estate which Chitkoobai had acquired passed on her death without issue to the first defendant, her husband. In the second place, they urged that the plaintiffs had no heritable right or interest in Laxamanrao's estate as they did not come within the category of *bandhus* entitled to succeed to his inheritance.

The Courts in India have overruled the first plea, and have held that on settling in the Central Provinces the family of Timaji adopted the *lex loci* and are now governed by the rules of the *Mitakhshara* generally in force in that province.

But they have given effect to the defendant's second contention; they have held in substance that the *Mitakshara* lays down a well-defined limit where the kinship entitling *bandhus* to succession ceases, and that the plaintiffs are beyond that limit. They have accordingly dismissed the suit.

The plaintiffs have appealed to His Majesty in Council, and the case has on both sides been argued with considerable ability and learning.

In dealing with the arguments addressed to this Board on behalf of the appellants their Lordships cannot help noticing one circumstance, viz., that in the Courts below, so far as appears from the record, it was not denied that there was a limit to the heritable right of *bandhus*, the only contention being whether it was seven degrees from the *propositus* or five as urged by the defendants. Before this Board, on the other hand, it has been strenuously contended that there is no limit to the succession of *bandhus*. Their Lordships do not wish, however, to draw any inference from this change of ground, for what they have to determine in this appeal is whether the term *bandhu* is to be construed as the plaintiffs argue in the broadest sense, or whether it is subject to any limitation, and in the latter case what that limitation is according to the law by which the parties are governed.

In the Hindu law the succession of heirs individually specified does not present much difficulty; the controversies and divergences amongst Hindu lawyers are chiefly concerned with collateral succession. Manu, the ancient sage, whose identity is lost in the mist of ages, but whose word is regarded as divine, after giving the rules regarding the succession of lineal male descendants and male ascendants, declares: "The property of a near *sapinda* shall be that of " a near *sapinda*." Chapter IX., v. 187. This is the translation given by Mr. Justice Banerjee in *Babu Lall* v. *Nankuram*, [1]. Sir William Jones in his translation of Manu's Institutes has rendered the passage somewhat differently, but for the purposes of the present judgment it is of little importance.

It is upon this enunciation that all the schools base the right of collaterals to succeed to the inheritance of a deceased person. This refers only to the succession of one male to another, for females inherit by express rules. The right of collaterals, therefore, is dependent on the existence of the *sapinda*-relationship between the *propositus* and the claimant. The contest that has arisen in the several schools is with regard to the meaning to be attached to the term *sapinda*, in other words, what does *sapinda*-relationship imply, and what is the true test for determining whether a particular person is a *sapinda* to the deceased or not? Jimutavahana, the author of the *Dayabhaga*, the guiding authority in the Bengal or *Gauriya* school, considers it to mean "community in the offering of funeral oblations." He draws his argument from the word *pinda*, which literally signifies a ball of rice offered at the performance of obsequial rites. Mr. Lowndes is probably right, that in early times the right of inheritance was dependent on the right to participate in the offering of funeral oblations, a doctrine which is part and parcel of the *Dayabhaga* rules.

But it is also clear that Vijnaneswara, the author of the *Mitakshara*, who appears to have flourished towards the end of the 11th and the beginning of the 12th century of the Christian era, some five centuries before Jimutavahana, abandoned the ancient doctrine, and construed *sapinda*-relationship to arise from community of blood, or to use

1. (1894) I. L. R. 22 Cal. 339.

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the quaint language of Hindu writers, "community of particles of the same body." His legal conception in this respect will appear clearly from a passage of the *Mitakshara*, Book I, chapter on Marriage, not included in Mr. Colebrooke's translation. To this passage their Lordships will have to refer later on in the course of this Judgment.

Messrs. West and Buhler in their "Digest of the Hindu Law," whose merit and authority have been recognised by eminent Hindu lawyers, have examined in detail the doctrines of the *Mitakshara* on this point, and their general conclusion as to Vijnaneswara's legal conception of *sapinda*-relationship is summed up in the following words, that he based it "not on the presentation of "funeral oblations but on descent from a common ancestor, and in the case of females also on marriage with descendants from a common ancestor." Mr. Colebrooke in his rendering of the *Mitakshara* has paraphrased *sapinda* as a relation "connected by funeral oblations," which resulted in virtually obliterating one of the main distinctions between the Benares and the Bengal schools. But it is now recognised that his paraphrase was erroneous, and that the true theory of *sapinda*-relationship propounded by Vijnaneswara was based on community of blood. It is on this theory of Vijnaneswara that the learned counsel for the appellants place their chief reliance. The plaintiffs, it is urged, are unquestionably related to Laxmanrao by tie of blood; they are, therefore, his *sapindas*, and consequently, in the absence of nearer kinsmen, entitled to his inheritance. It is to be remarked, as has been observed in previous cases before this Board, that the Hindu law contains its own principles of exposition, and that questions arising under it cannot be determined on abstract reasoning or analogies borrowed from other systems of law, but must depend for their decision on the rules and doctrines enunciated by its own lawgivers and recognised expounders.

The *Mitakshara* purports to be a commentary on the work of Yajnavalkya, who is supposed to have lived about the second century of the Christian era, about a thousand years before Vijnaneswara. In the *Mitakshara* he is spoken of in terms of deep veneration; and his doctrines, developed by Vijnaneswara

certainly show a marked advance over the legal conceptions of his predecessors. So far as Their Lordships have been able to ascertain, the *bandhus*, or distant kinsmen related to the deceased through females, make their appearance as heirs first in Yajnavalkya's enunciation. Mr. Borrodaile, in the first volume of his Reports of the Bombay Sudder Dewany Adalut Decisions, has given a translation of the Index to *Mitakshara*, which furnishes a general idea of the scheme of this great and important work of Hindu law. It consists of two books; the first called the *Acharadhyayu* "On Established Rules of Conduct or Ordinances"; the second the *Vyavaharadhyaya* "On the Laws and Customs of the People." Both books, however, are so inter-related that the rules of the one can scarcely be construed without reference to the other.

It is to be noted that in the *Vyavastha Chandrika* the Book on "Established Rules of Conduct" is cited as the *Achara Adhyaya* ("Chapter or Book on Established Rules of Conduct"), whilst in the decisions of the Indian Courts and recent works on Hindu Law, it is referred to under the name of the *Acharakanda* ("Division or Part relating to Established Rules of Conduct").

In the third chapter of the *Acharakanda* Vijnaneswara lays down the rules relating to the forbidden degrees of kindred, and here he defines his theory of relationship. A translation of this passage is to be found in the "Digest of Hindu Law," [1] by West and Buhler, and also in the judgment of the Bombay High Court in *Lallubhai* v. *Mankuarbai*, [2] which came on appeal to Her Majesty in Council, and was affirmed by this Board.[3]

That passage runs thus:—

" He should marry a girl who is non-sapinda (with himself). She is called " his sapinda who has particles of the body (of some ancestor, &c.), in common " (with him), non-sapinda means not his sapinda. Such a one (he should marry) " Sapinda-relationship arises between two people through their being connected by " particles of one body. Thus the son stands in sapinda-relationship to his father " because of particles of his father's body having entered (his). In like (manner " stands the grandson in sapinda-relationship) to his paternal grandfather and the " rest, because through his father particles of his (grandfather's body have entered " into (his own). Just so is (the son a sapinda-relation), of his mother, because " particles of his mother's body have entered (into his). " Likewise the grandson " stands in sapinda-relationship to his maternal grandfather and the rest through

1. Volume I., page 120. 2. (1876) I.L.R., 2 Bom. 388.
3. (1880) L.R. 7 I.A. 212.

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"his mother. So also (is the nephew) a sapinda-relation of his maternal aunts "and uncles, and the rest, because particles of the same body (the paternal "grandfather) have entered into (his and theirs); likewise does he stand in "sapinda-relationship) with paternal uncles and aunts, and the rest. So also the "wife and the husband (are sapinda-relations to each other), because they together "beget one body (the son). In like manner brothers' wives also are sapinda-"relations to each other), because they produce one body (the son), with those "severally who have sprung from one body (*i.e.*, because they bring forth sons by "their union with the offspring of one person, and thus their husbands' father is "the common bond which connects them). Therefore one ought to know that "wherever the word sapinda is used, there exists (between the persons to whom it "is applied) a connection with one body, either immediately or by descent."

Then after refusing certain objections to his explanation of the word *sapinda,* Vijnaneswara proceeds thus :—

"In the explanation of the word 'asapindam' (non-sapinda, verse 52), it "has been said that sapinda-relation arises from the circumstance that particles of "one body have entered into (the bodies of the persons thus related) either "immediately or through (transmission by) descent. But inasmuch as (this "definition) would be too wide, since such a relationship exists in the eternal "circle of births, in some manner or other, between all men, therefore the author "(Yajnavalkya) says :—

Verse 53 : "After the fifth ancestor on the mother's and after the seventh on "the father's side."—"On the mother's side in the mother's line, after the fifth, "on the father's side in the father's line, after the seventh (ancestor), the sapinda-"relationship ceases ; these latter two words must be understood ; and therefore "the word sapinda, which on account of its (etymological) import (connected by "having in common) particles (of one body) would apply to all men, is restricted "in its signification, just as the word pankaja (which etymologically means "'growing in the mud,' and therefore would apply to all plants growing in the "mud, designates the lotus only) and the like ; and thus the six descendants, "beginning with the son, and one's self counted) as the seventh (in each case), are "sapinda-relations*.(1)

The rendering of the above passages by Pandit Rajkumar Sarvadhikari though apparently more free is certainly instructive and interesting, and deserves quotation as showing what a learned Hindu scholar considered was in the mind of Vijnaneswara when defining the word *sapinda.*

"The Mitakshara then explains the following words in the next verse of "Yajnavalkya beyond the fifth and seventh degrees on the mother's side and the "father's side respectively.

"It has been already explained, that the relation of sapinda exists by reason "of the connection of the parts of the same body, both directly and indirectly. "But such a relationship is possible everywhere in some way or other between "all men in this wide wide world without a beginning. So the definition would "be too wide. It is for this reason that the sage limits it thus, 'Beyond the "fifth, &c.

1. West and Buhler, vol. 1., p. 120.

"The meaning is 'on the mother's side', *i.e.*, in the line of the mother, after "the fifth degree: 'on the father's side,' *i.e.*, in the line of the father, after the "seventh degree, the relation of sapinda ceases.

"Although the word sapinda, therefore, may be applied in its etymological "sense almost to all men it is, there can be no doubt, limited in its signification to "certain definite individuals; just as the word mud-born is applied only to a lotus.

"Thus the father and the other ascendants are six sapindas; and the son and "the other decendants are six; and the man himself is the seventh. In case of the "division of a line also, the enumeration should be made until the seventh degree, "commencing from whence the direction of the line changes. This rule should be "applied in every case." * Sarvadhikari's Tagore Law Lectures, p. 603.

Their Lordship have no manner of doubt that in the passages quoted above, Vijnaneswara was laying down rules for the limitation of *sapinda*-relationship generally.

It has been suggested in argument that this limitation is with regard to marriage only that it defines the prohibited degrees within which a man cannot marry. A similar contention was put forward in *Lallubhai* v. *Mankuvarbai*[1]. The observations on this point of the learned Judges, one of whom was the distinguished jurist Mr. Justice West (co-author of the Digest, and afterwards Sir Raymond West) appear to Their Lordships as extremely apposite to the present case.

Chief Justice Westropp in that case at p. 426 said as follows:—

"It has been contended for the plaintiffs that in the above extracts from the "*Achara Kanda* and the *Sanskara Mayukha* the respective authors were dealing "with sapinda relationship in its ceremonial aspect only, and that, when they "wrote upon sapinda relationship with reference to inheritance they may be regar-"ded as viewing sapinda-relationship in the same light as the author of the Daya "Bhaga and certain other commentators on Hindu Law. But we think that the "burden rests upon the plaintiffs to show that Vijnaneswara and Nilakantha "regarded sapinda-relationship as resting on a different basis for the purpose of "inheritance from that on which, dogmatically perhaps, but most distinctly, the "one has placed it in the *Achara Kanda* and the other in the *Sanskara Mayukha*. "We do not think that the learned counsel for the plaintiffs have given any good "reason for assuming that the authors intended to make any such difference, nor "is it likely that they did.

"The religious and ceremonial law of the Hindus as prevailing amongst castes, "or in particular localities, is generally speaking almost inseparably blended with "their law of succession in the same castes or localities, an opposite condition "being exceptional."

As a matter of fact, as Messrs. West and Buhler point out, Vijnaneswara expressly says wherever the word *sapinda* is used "there exists (between the persons to whom it is applicable) a "connection with one body either immediately or by descent."

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[1] (1876) I. L. R., 2 B. 388. at. p. 426.

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In *Umaid Bahadur* v. *Udai Chand* [1] the learned Judges of the Full-Bench (one of whom was a Hindu Judge of great eminence express themselves on this point in the following terms:—

"Having taken great pains in accurately defining the word sapinda in the "beginning of his work and having said in clear words in the passage in question "that 'one ought to know that wherever the word *sapinda* is used there exists "(between the persons to whom it is applied) a connection with one body either "immediately or by 'descent,' it is hardly reasonable to suppose that the author "used the word in another part of the same work in a different sense. It is a well "understood rule of construction amongst the authors of the Institute of Hindu "Law that the same word must be taken to have been used in one and the same "sense throughout a work unless the contrary is expressedly indicated."

Nor have the learned counsel for the appellants been in a position in this case to refer to any authority excepting one, which Their Lordships will notice later on, in support of their proposition that the limitations of Vijnaneswara on sapinda-relationship are confined to marriage, impurity, and exequial rites, and do not relate to inheritance.

The law of inheritance in the *Mitakshara* translated by Mr. Colebrooke, occurs in Book II., and forms chapter VI, of that part of the work. It is entitled "*dayavibhaga*" or "partition of heritage." It is unnecessary to refer to chapter I. of Mr. Colebrooke's translation or to the earlier sections of chapter II., as they deal with subjects which do not come within the purview of this judgment. It is with Ss. V, VI and VII of chapter II that Their Lordships are principally concerned. The rendering of the word *sapinda* as "relations connected by funeral oblations" runs throughout Mr. Colebrooke's translation. His arrangement of the matter is also different from the original where the subject of inheritance appears to be dealt with in a consecutive form in chapter VI.

Mr. Colebrooke has split it up into two chapters, divided into sections. (This circumstance is noticed in the Bombay judgment). S. V, chapter II (in Mr. Colebrooke's Translation), deals with the succession of the *gotraja*, on failure of "brother's sons." Although *gotraja* is explained by the term *gentiles* borrowed from the Roman system, to which no doubt the Hindu system bears a remarkable analogy, it would be more convenient to adhere to the definition given in the *Mitakshara*

1. (1880) I. L. 6 Cal. p. 119 at p. 126.

itself. Omitting the English equivalents introduced into the translation, and retaining the Sanskrit expressions, the paragraphs run as follows:—

" 3. On failure of the paternal grandmother, *gotraja sapindas*, namely, the " paternal grandfather and the rest, inherit the estate.

" For *bhinnagotra sapindas* are indicated by the term bandhu.

" 4. Here, on failure of the father's descendants, the heirs are successively the " paternal grandmother, the paternal grandfather, the uncles and their sons.

" 5. On failure of the paternal grandfather's line, the paternal great grand- " mother, the great grandfather, his sons and their issue, inherit. In this manner " must be understood the succession of the *samanagotra sapindas*.

" 6. If there be none such, the succession devolves on samanodakas, and they " must be understood to reach the seven degrees beyond sapindas, or else as far " as the limit of knowledge and name extend. Accordingly, Vrihat Manu says, " 'The relation of the sapindas ceases with the seventh person, and that of samano- " 'dakas extends to the fourteenth degree, or, as some affirm, it reaches as far as " 'the memory of birth and name extends. This is signified by gotra.' "

Their Lordships have preferred to adopt for the purposes of this judgment the translation which was before this Board in *Lallubhai's Case*.

It is to be observed that the rule in paragraph 3 is thus stated in the *Viramitrodaya* Shastri Golap Chunder Sarkar's Tran., page 199. " On failure of the paternal grandmother, the " paternal grandfather and the other sapindas of the same gotra " are heirs ; since the sapindas (or persons connected through " the pinda or body) of a different gotra are included under the " term bandhu or 'cognates.' "

The earliest expounders appear sometimes to have used the term *bandhu* to signify a *sapinda* without any idea of including cognates. This is clear from a passage of the *Viramitrodaya*, Ibid, page 142 where, after quoting the rule as to the succession of collaterals given by Vishnu who places the *bandhus* immediately after brothers' sons, it says as follows:—"Here the term *bandhu* " (kinsman) signifies a *sapinda*, and the term *sakulya* (distant " kinsman) means a *sagotra*, or one descended from a common " ancestor in the male line (other than a *sapinda*) ; if by the term " *bandhu* the cognates of the father were comprised, then there " would be a conflict with the order mentioned by yogiswara, the " Contemplative Saint," *i.e.*, Yajnavalkya. Yajnavalkya himself employs the expression indiscriminately in various places to signify connections and friends. But in chapter II of his *Dharmasastram*, he distinctly introduces *bandhus* as

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acquiring a heritable right on failure of the *gotraja*. The passage in Rao Vishwanath Mandlik's translation* page 220 is as follows:—"The wife, daughters, both parents, brothers, and "likewise their sons, gotrajas (gentiles), bandhus (cognates), a "pupil and a fellow-student. Of these, on failure of the "preceding, the next following in order is heir to the estate of "one who has departed for heaven leaving no *putra* (lineal male "descendants)."

Learned counsel for the respondents urges that this inclusion of *bandhus* or cognates forms a marked extension of the right of inheritance to people who until then were not regarded as heirs, and he contends that it is hardly likely this remarkable change should have been made without any limitation, considering that the *sapinda*-relationship was subject to a limit.

To determine how far this contention is well-founded, it is necessary to examine a little more closely the doctrines of the *Mitakshara* relating to the succession of collaterals. Vijnaneswara in reality seems to have shaped the rules which govern this branch of the law of inheritance in force in the Benares school. In paragraph 3, section V (Colebrooke's Translation) in describing the *gotraja-sapinda* or consanguinous relations sprung from the same stock, he emphasises the fact of their being members of the same family by the specific statement that the *sapindas* belonging to a different family (*gotra*)—the *bhinna-gotra*—are included under the designation of *bandhus*. This is clearly borne out by the pasasge of the *Viramitrodaya* already referred to. Henceforth the word *bandhu*, therefore, has, in the system of the *Mitakshara*, a distinctive and technical meaning, in other words it signifies the *bhinnagotra-sapindas*.

In paragraph 5 for the word *gotraja-sapinda* is substituted the more definite term of *samana-gotra sapinda*. With regard to this Messrs. West and Buhler observe that "The substitution "of samana-gotra for gotraja, as well as the employment of "bhinna-gotra to designate the opposite of the term, both show "that Vijnaneswara took gotraja in the sense of belonging to "the same family." Commenting on the passage relating to the succession of the *gotraja sapinda*, the *Viramitrodaya*, which is regarded as one of the most important commentaries

on the *Mitakshara*, says "similarly to the seventh (degree) the "sapindas of the same gotra take the estate of a person without "male issue See p. 199."

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This limitation of the seventh degree appears in Yajnavalkya's Institutes, chap. I., paras. 52, 53, in these words:—"A man should marry a girl . . . . who is not a sapinda "of him . . . . who is descended from one whose gotra "and pravara are different from him; and who is removed five "degrees on the mother's and seven on the father's side." [1] The comment of Vijnaneswara on this text of Yajnavalkya has already been given *in extenso* in a previous part of this judgment, but the following lines may be quoted against with advantage:—"On the mother's side, in the mother's line "after the fifth; on the father's side, in the father's line, after "the seventh (ancestor) the sapinda-relationship ceases." [2]

The translation by Golap Chunder Shastri of the passage, in which these words occur, is important, as he is the authority on whose expositions the appellants chiefly rely. It runs thus:

"While explaining the term non-sapinda, the sapinda relationship is "stated to be directly or mediately through connection with one body, but that "relationship of all persons may, in one way or other, be traced with all other "persons in this world of eternal transmigrations of the soul with its minute body, "and so it would include persons that are not intended to be included; hence it "is ordained:—

"and is beyond the fifth and seventh from the mother and from the father (respectively)."

"The purport is that sapindia relationship ceases beyond the fifth from the "mother, *i.e.*, in the mother's line and beyond the seventh from the father, *i.e.*, "in the father's line" Hindu Law, p. 54.

It is quite clear, therefore, that the limitation of the seventh degree with regard to the *samanagotra sapindas* given by Mitra Misra in the *Viramitrodaya* is taken from the rule enunciated by Vijnaneswara on Yajnavalkya in the *Acharakanda* in respect of the cessation of *sapinda* relationship.

Now, a *bhinnagotra sapinda* is a *bandhu* according to Vijnaneswara. The classification contained in section VI, chapter II. (Colebrooke's Translation) shows clearly who the *bandhus* are whom Vijnaneswara treats as *bhinnagotra sapindas*

1. Rao Vishwanath Mandlik's transl., p. 167.
2. West and Bühler, p. 119; Mayne's Hindu Law (7th ed.) p. 691, para. 516.

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entitled to succession on failure of the *gotraja*. The passage as translated by Mr. Colebrooke runs thus:—

"1. On failure of gentiles, the cognates are heirs. Cognates are of three "kinds; related to the person himself, to his father, or to his mother: as is declared "by the following text, 'The sons of his own father's sister, the sons of his own "mother's sister, and the sons of his own maternal uncle, must be considered "as his own cognate kindred. The sons of his father's paternal aunt, the sons "of his father's maternal aunt, and the sons of his father's maternal uncle, must "be deemed his father's cognate kindred. The sons of his mother's paternal "aunt, the sons of his mother's maternal aunt, and the sons of his mother's "maternal uncles, must be reckoned his mother's cognate kindred."

"2. Here, by reason of near affinity, the cognate kindred of the deceased "himself, are his successors in the first instance, on failure of them, his father's "cognate kindred, or if there be none his mother's cognate kindred. This must "be understood to be the order of succession here intended."

Here Mr. Colebrooke renders the word *gotraja* into gentiles, and *bandhus* into cognates. He also paraphrases the three classes under which Vijnaneswara groups the technical *bandhus*, *viz.*, the *atma bandhus*, the *pitri bandhus* and the *matri bandhus* as "cognates related to the person himself, to his father, or to "his mother."

Their Lordships have little doubt reading these passages by the light of the comments in the *Viramitrodaya* (P. 200) that Vijnaneswara was using the term *bandhu* in a restricted and technical sense, as implying a relation belonging to a different family but united by *sapinda*-relationship. In fact he expressly says so (paragraph 3, section V., chap. II.).

It is not disputed that the plaintiffs do not come within the three categories mentioned above. But it is urged on the authority of *Gridharilal Roy* v. *The Government of Bengal* [1] that the enumeration is not exhaustive but merely illustrative.

In that case the question for decision was whether a maternal uncle not being specifically included in the enumeration of *bandhus* in the *Mitakshara* was excluded from succession. Answering that proposition in the negative, and holding that although not expressly mentioned he was entitled to succeed as a *bandhu* this Board observed that the text did not purport to be an exhaustive enumeration of all *bandhus* "who are capable of inheriting, nor was it cited as such for that purpose by the author; and that it was used simply as a proof or illustration of his proposition that there are three kinds or classes of *bandhus*.

1. (1868) 12 M. I. A. 448.

These remarks hardly warrant the contention, which is attempted to be based on them, that the classes specified by Vijnaneswara can be added to.

In the present case, however, it does not seem necessary to Their Lordships to enter upon the determination of the question whether the classes can be extended, for the point at issue can be decided on other grounds.

The limitation of five degrees clearly applies, and can only apply, to the *bhinnagotra sapindas.* But it is contended that this limitation is confined to prohibition in respect of marriage. As has already been observed, a part of the limitation appears to have been applied to the succession of *samanagotra sapindas*; Their Lordships are unable to see on what principle can it be said that the other part relative to kinsmen, who are equally *sapindas* but belong to a different *gotra* or gens, must be restricted to matrimonial affinity.

Considerable reliance has been placed on the statement of the law by Shastri Golap Chundar Sarkar in his work on Hindu Law. Great respect is due to the opinions of that learned lawyer. But it seems to Their Lordships that their weight is considerably discounted by his desire, in order to prevent the deceased's property becoming so to speak derelict and thus escheating to the Crown, to bring in the caste-people of the deceased also as *bandhus,* and that somewhat uncertain note of his conclusion Viramitrodaya, Page 157, where he says:—

"The conclusion, therefore, which appears to legitimately follow from the "foregoing consideration, is, that the word bandhu in the Mitakshara means and "includes either all cognate relations without any restriction, or at any rate, all "cognates within seven degrees on both the father's as well as on the mother's "side."

Again, his attempt to widen the signification of the word *sapinda* by employing the English equivalent of *relation* does not seem to be supported by the definition of *sapinda*-relationship in the *Mitakshara* itself.

Reference has also been made to certain passages in Rao Vishwanath Mandlik's valuable work, in which he says that the *sapinda*-relationship for inheritance is not always the same as for marriage or impurity (arising from birth or death). That may or may not be; but in one part of his work to which the Judicial Commissioner has referred in his judgment, the learned

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translator of Yajnavalkya distinctly says that *sapinda* connection in general is "co-extensive with that for marriage purposes." Nor in this connection their Lordships think, can the following passage in the *Viramitrodaya* be overlooked.

"And the text, 'The sapinda relationship, however, ceases in the seventh "'generation'—is to be explained consistently with the text of Yajnavalkya, namely " (after the fifth and the seventh from the mother and the father (respectively) to " mean that it remains in the seventh but ceases in the eighth generation. Hence, " as in the case of the unmarried females, the sapinda relationship extending " over three generations, as is declared in the chapter on impurity (occasioned by " death, &c.) is considered to be with reference to that alone; so it is to be " deemed that this sapinda relationship (extending to the fourth degree) is relative " to succession alone."* Viramitrodaya, page 157.

In the absence of any authoritative text Their Lordships do not see their way merely on abstract reasoning to displace a view of the law which has received the recognition of the Courts in India, and which the District Judge, an officer of great experience and learning, says is accepted by "public opinion." As has already been observed, the right of inheritance is founded on *sapinda*-relationship, which, under the *Mitakshara*, means consanguinity, in a distinct legal sense clearly explained by the author. This bond comes to an end with the fifth degree when the descent is through a female. It seems difficult to conceive that the right to inherit should continue after the relationship on which it is founded, and which gives it birth, has come to an end.

In the case of *Umaid Bahadur* v. *Udai Chand*[1] one of the tests employed for determining whether the defendant in that case was a *sapinda* of the *propositus* was the mutuality of *sapinda*-relationship. The doctrine of mutuality is based on the rule enunciated by Manu, and is fully explained by Rajkumar Sarvadhikari in his lectures at page 690. Another well-known Hindoo writer of the present day speaks thus of the above rule:—

" It is to be observed here that the wealth of a sapinda is taken by his nearest "sapinda, according to the well-known text of Manu. From that text it follows "that the relation of sapindaship must be mutual. Among agnates the relation "of sapindaship is always mutual; but among cognates it is not so in a few cases. "In order to determine whether any persons are heritable cognates of the propo- "situs 'it is necessary to see whether they are related as sapindas to each other,' "*Umaid Bahadur* v. *Udai Chand*. (1) Unless sapindaship is mutual, one cannot be "the heir of the other." †

1. (1880) I. L. 6, Cal. 119.

† Commentary on Hindu Law by J. N. Bhattacharya, Page 459.

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In *Babu Lal* v. *Nankuram* [1] the rule of the *Mitakshara* enunciated in the *Acharakanda* relative to *sapinda*-relationship in respect of marriage is assumed as applicable to inheritance. In fact the judgment proceeds on that basis; and the order of *sapinda*-relationship with its limitations in Rajkumar Sarvadhikari's Tagore Law Lectures is adopted as representing a correct exposition of the *Mitakshara* law. The doctrine of mutuality is also explained in clear terms:—

"Again, a sapinda of the propositus to be capable of inheriting must satisfy "a further condition, namely, that he must be so related to the propositus, that "the propositus is also a sapinda of him either directly or through the father or "the mother. This mutuality of sapinda relationship between the propositus and "his heritable sapindas is assumed as a necessary condition in the case of *Umaid* "*Bahadur* v. *Udai Chand*, 2 and the authority for this is to be found in the text of "Manu (chapter IX., 187) cited in the Mitakshara, chapter II., section III, verse "3, as interpreted by Balambhatta and Visweswara Bhatta, the two leading "commentators on the Mitakshara. The text according to these commentators "means this, the property of a near sapinda shall be that of a near sapinda. From "this it is clear that a man in order to be a heritable sapinda of the propositus "must be so related to him that they are sapindas of each other."

These two decisions of the Calcutta High Court have been challenged on the ground that they represent *Dayabhaga* views rather than the doctrines of the *Mitakshara*. To Their Lordships the objection seems hypothetical and without any basis excepting the criticisms of Golap Chunder Sastri. One of the learned Judges who decided *Babu Lal's*[1] case was the distinguished Judge and erudite Sanskrit scholar, Mr. Justice Gurudas Banerjee, who was not likely to allow his mind to be confused by *Dayabhaga* conceptions in determining a case under the *Mitakshara* law.

The general conclusion to which a close examination of the authorities leads their Lordships may be briefly stated as follows; (*a*) that the *sapinda*-relationship, on which the heritable right of collaterals is founded, ceases in the case of the *bhinna-gotra sapinda* with the fifth degree from the *propositus*; (*b*) that in order to entitle a man succeed to the inheritance of another he must be so related to the latter that they are *sapindas* of each other, which is only a paraphrase of Manu's rule.

In the present case the plaintiffs are Laxmanrao's paternal grandfather's son's son's daughter's daughter's sons. They are his *bhinnagotra* beyond the fifth degree, and, as the District

1. (1894) I. L. R. 22 Cal. 339. 2. (1880) I. L. R. 6 C. 119.

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Judge points out, the element of mutuality is wanting between them and Laxmanrao.

Two considerations were strongly pressed on behalf of the appellants to induce their Lordships to extend the application of the *sapinda*-relation in the case of *bandhus* beyond the fifth degree mentioned in the *Mitakshara.* It was urged that it is hardly likely Vijnaneswara would give a right of inheritance to a spiritual preceptor or guru before kinsmen, however remotely connected. This argument appears to ignore the peculiar and intimate relationship which Their Lordships understand exists in the Hindu system between the pupil and the guru who has to initiate him into the mysteries of the Vedic laws and rites, and under whose roof he has to pass many years of his life. It is easy to suppose that in such circumstances the mystical relationship between a spiritual preceptor and a pupil should be regarded as creating a far closer tie than remote relationship of blood.

As regards the other consideration which is based on the possibility of the Crown becoming a claimant in the presence of remote *bhinnagotra,* Their Lordships need only observe that whether such a claim would be justified or even be likely to be advanced, it does not seem necessary to express an opinion in the present case.

Here the defendant is in possession of Laxmanrao's estate claiming as heir to his wife, Laxmanrao's daughter. The plaintiffs' suit is an action in ejectment, and they must, in order to succeed strictly prove their title.

It is a matter of satisfaction to Their Lordships that they find themselves in complete agreement with the learned Judges in the Courts below. The District Judge is himself a Hindoo, versed in Sanskrit, and has examined the authorities in original. His decision is entitled to great weight and consideration.

On the whole Their Lordships are of opinion that this appeal should be dismissed, and they will humbly advise His Majesty accordingly.

The appellants must pay the costs of this appeal.

Solicitor for appellants :—*E. Dalgado.*

Solicitor for respondents :—*T. L. Wilson and Co.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Oldfield and Mr. Justice Seshaghiri Aiyar.

Minakshi and others ... *Plaintiffs**.

v.

Muniandi Panikkar and others ... *Respondents.*

Minakshi *v.* Muniandi Panikkar.

Hindu Law—Stridhanam—Succession to—Degraded woman—Competition between legitimate son and illegitimate daughter—Rights of illegitimate children under the Hindu Law—Law applicable to Dancing girls whether to be applied to offspring of prostitutes—Unchastity—Whether severs ties of blood.

Unchastity of a Hindu woman does not sever her relationship with her kindred and the Stridhanam property of a degraded woman devolves according to the ordinary rules of Hindu Law.

In a competition between the legitimate son and an illegitimate daughter *held* that the son excluded the daughter in succession to the stridhanam of the mother.

Illegitimate children have no rights of inheritance under the Hindu Law especially in the Mitakshara system unless the texts specially provide for them as in the case of the illegitimate sons of Sudras.

Unchastity of a married woman will not bring her within the class of dancing girls so as to enable her to exercise the rights which by custom and precedent have been allowed to them.

The word 'daughter' in the Chapter on succession should be understood in its primary sense of legitimate daughter.

Second appeal from the decree of the District Court of Madura in A. S. No. 323 of 1911 preferred against the decree of the Court of the Principal District Munsif of Madura in O. S. No. 146 of 1910.

One Mukkayee, a Sudra woman had a son, the defendant in the case by her marriage. After her husband's death she was living with another and had by him one daughter and sons. She died leaving some properties and the daughter born to her after the death of her husband sued the son born during wedlock for recovering possession of the properties left by her as being a preferable heir to the estate left by Mukkayee.

Both the lower Courts dismissed the plaintiff's suit holding that the legitimate son was the preferable heir and not the illegitimate daughter. The plaintiff appealed to the High Court.

P.S. Narayanaswami Aiyar for C.V. Anantakrishna Aiyar for the Appellant.

P. R. Ganapathi Aiyar for K. N. Aiya for the Respondent

P. S. Narayanasami Aiyar : contended.

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* S. A. No. 427 of 1913. 26th August 1914.

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Mukkayee, whose inheritance is to be traced in this case is a prostitute and not a concubine. A concubine should not have been married before. In the case of illegitimate sons, who inherit to their father's estate, they should be born of a concubine, that is, a maiden kept by their father. *Annayyan* v. *Chinnan* [1] *Narumayya Chetti* v. *Thiruvengadathan Chetti* [2], *Harilal Singha* v. *Rupmanjari Burmoni* [3]. If she is not a concubine, she must be a prostitute. Prostitutes and dancing girls are governed by the same rules of succession.

Gains of prostitution have been held to be Stridhan *Tripuracharan Banerji* v. *Harimati Dasi* [4].

In the case of *stridhan,* daughters are heirs. Their illegitimacy is not a disqualification. The illegitimate son of a Sudra takes the property of his father. Illegitimate brothers have been held to be heirs of each other, *Myna Bai* v. *Uttaram* [5]. If an illegitimate son can succeed to his father, the daughters being preferred in the case of *stridhan* to sons an illegitimate daughter should succeed to her mother's stridhan in preference to sons. Degradation does not sever kinship. A degraded heir of a higher degree ought to be preferred to an undegraded heir of the lower. In *Hira Lal Singha* v. *Tripuracharan Ray* [6], it was held that illegitimate daughters should be preferred to the husband's heirs of the deceased. In S. A. No. 1446 of 1912, unreported, an illegitimate daughter of a prostitute has been preferred to the illegitimate son. The following authorities were also cited:—

Subbaraya Pillai v. *Ramasami* [7], Trevelyans Hindu Law, p. 445, Jolly's Narada P. 96, Banerjea on Marriage and Stridhanam pp. 77, 411.

There is no contest in this case between the degraded and undegraded heirs of a fallen woman, because the illegitimate daughter was married even before Mukkayee's death.

P. R. Ganapathi Aiyar for the Respondent, contended as follows.

It cannot be said that the Hindu Law rules of succession do not apply to a woman leading an improper life. As regards males it has been held that mere laxity from orthodox rules does

1. (1909) I. L. R. 33 M. 366. 2. (1913) 24 M.L. J. 233.
3. (1912) 15 I. C. 137. 4. (1911) I. L. R. 38 C. 493.
5. (1864) 2 M. H. C. R. 171. 6. (1913) I. L. R. 40 C. 650.
7. (1899) I. L. R. 23 M. 171 at 178.

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not make him a non-Hindu, so as to make Hindu Law rules of succession inapplicable. *Bhagwan Koer* v. *J.C. Bose* [1], Union like this does not lead to expulsion from caste.

The Calcutta High Court has held that a Hindu though degraded is still a Hindu governed by Hindu Law rules of succession. *Narendra Nath Bairagi* v. *Dinanath Das* [3], *Sarnamoyee Bewah* v. *Secretary of State for India*[4]. The case of dancing girls stands on a different footing. They are governed by custom. *Muthukannu* v. *Paramasami* [5], *Venku* v. *Mahalinga* [6]. The property of which inheritance is to be traced in this case is *Stridhan*. Under the Mitakshara Law an illegitimate daughter is not an heir to Stridhan *Vide*, Mitakshara Ch. II, S. II, cl. 8, 9, 19. It states who will be the heirs to *Stridhan*, if a woman dies without issue, *viz.*, those that are enumerated. It cannot be said that an illegitimate daughter comes within the term daughter in the enumeration. Compare the order of succession to males in the Mitakshara where the claims of illegitimate sons are considered not under the head of issue but separately. Mitakshara, Ch. I, S. 12. When a term is used, it is to be understood in its primary sense. "Issue" should only be understood as connoting legitimate issue. The question has been discussed with reference to *Stridhan* in *Bhimacharya* v. *Ramacharya* [7]. In *Jagannath Raghunath* v. *Narayan* [8], a case of Stridhan, husband was preferred to an illegitimate son.

The text of Narada only refers to *Kanina* sons who are now obsolete. It has been held that all sons except Aurasa and *Dattaka* are obsolete. *Thakur Jibnath Singh* v. *Court of Wards* [9].

The Court delivered the following

Judgments :—*Oldfield J.* I have had the advantage of reading the judgment which my learned brother is about to deliver, and concur in it. I shall therefore merely state shortly the negative reasons, for which I think that the appellant's legal argument must be rejected.

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1. (1903) I. L. R. 31 C. 33 (P. C.) 2. (1912) 23 M.L.J. 493.
3. (1909) I. L. R. 36 C. 824. 4. (1897) I. L. R 25 C. 254 at 288.
5. (1889) I. L. R. 12 M. 214 at pp. 217, 218. 6. (1888) I.L.R. 11 M. 393.
7. (1909) I. L. R. 33 B 452. 8. (1910) I. L. R. 34 B. 553.
9. (1875) L. R. 2 I. A. 163, 165.

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The case, it seems to me, must be decided on the broad ground that it is for the appellants to show that the illegitimate daughter of a woman, who lived in adultery, inherits her stridhanam, over which she had full power, in preference to her legitimate son: and that they have neither produced any direct precedent for such succession nor established any principle justifying it. As it is not alleged that direct precedent is available, I turn at once to the principles put forward.

Firstly, the appellants contend for the application of the law of succession applicable to dancing girls to the offspring of a prostitute, such as they allege the 1st appellant's mother to have been. It is not necessary to decide whether she was one, as the appellants contend, with reference to *Annayyar* v. *Chinnan*[1] and the fact that her immoral life began after her marriage, or was a permanent concubine as the facts suggest. For the argument must fail, even as put forward. On the assumption that she was a prostitute, there is no authority in Madras for applying to her estate the law, which has been recognised as applicable to dancing girls solely in virtue of the established custom of their caste. *Vide Venku* v. *Mahalinga* [2] and *Muthukannu* v. *Paramasami*[3]. And I observe here, as in connection with the appellant's other contentions, that there is no reason for a liberal construction, the effect of which would be to disappoint expectations founded on legitimacy. It was then contended that references to daughters in the Mitakshara should be read as including all daughters, both legitimate and illegitimate, and that all alike should be preferred to the legitimate son, as heirs to their mother. But, firstly, that is not the primary sense of those references and is unauthorised by the rules of interpretation recognised by both English and Hindu Law. Vide *Bhimacharya* v. *Ramacharya* [4]. And next it has not been shown how such a substitution can be carried out or logically limited. Should it, for instance, be extended to the law relating to the daughter's right to inherit from the father in spite of the absence of any special provision in her favor, such as is available in the case of illegitimate sons?

Next, there is the argument based on the alleged severance of the 1st appellant's mother from her legitimate family owing

1. (1907) I. L. R. 33 M. 366.
2. (1888) I. L. R. 11 M. 393.
3. (1889) I. L. R. 12 M. 214.
4. (1909) I. L. R. 33 B. 452.

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to her unchastity and consequent degradation. It is based first on an opinion of the Pandits in *Tara Munne Dosse* v. *Motee Burnanee and another* [1], that the heirs of an unchaste and outcaste woman are her daughters, born (as the report in the next case cited shews) in prostitution, who lived with her as prostitutes; not the sons of her daughter who had married and lived respectably. The principle of severance is statedly relied on and no doubt justified the decision against the legitimate family, but it may, be pointed out that it involved nothing affirmative in favour of the prostitute daughters, defendants and that it was not necessary that it should do so, when the disqualification of their opponents was sufficient for the decision of the case. *Mayna Bai* v. *Uttaram* [2] dealt with competition between illegitimate children only, but contains an *obiter dictum* that in Madras it has never been doubted that the children of the prostitutes succeed to the property of their mother." The law, however, as it now stands in this Presidency must be taken to have been stated finally in the much more recent case of *Subbaya Pillai* v. *Ramasami Pillai* [3]. It no doubt does not appear that there was competition there between legitimate and illegitimate issue, for the report affords no description of the defendants. But the decision is against any severance of the degraded wife from her undegraded relatives and includes an expression of dissent from *Siva Sengu* v. *Minal* [4] in which *Taramonee's* case [1] was relied on. The actual decision in *Narumayya Chetti* v. *Thiruvengadathan Chetti* [5] is in accordance with this view, there being nothing in its reference to the rights of illegitimate children inconsistent with their postponement to all legitimate heirs.

Lastly evidence has been placed on the observation in *Subbaraya Pillai* v. *Ramasami Pillai* [3] that in applying so much of the Hindu Law as can without incongruity be applied either with reference to those connected with the degraded person after his degradation or in their absence, to those remaining undegraded, the Courts would, at all events be administering those rules as rules of equity and good conscience, which are the guides in

1. VII Sud. Diw. Ad. 273.
2. (1864) 2 M. H. C. R. 196.
3. (1899) I. L. R. 23 M 171.
4. (1888) I. L. R. 12 M. 277.
5. (1912) 24 M. L. J. 223.

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cases not otherwise provided for." This seems to have been entirely *obiter*. For, as stated, it does not appear that any party to the case was connected with the degraded person after her degradation. And I therefore feel at liberty to express my respectful dissent from it. For, firstly in the absence of any but an expressly limited recognition of the rights of illegitimate children in Hindu Law, it is not, I conceive possible to apply its rules generally in their interest without incongruity; and next I cannot understand how the Court would be following any rule of equity or good conscience in doing so or would be promoting any other result than the mitigation of the disabilities, which at present in some degree at least deter people from the formation of illicit relations.

The appeal is dimissed with costs.

Seshaghiri Aiyar J:—The suit relates to the property of one Mukkayi. First plaintiff is her daughter, by 2nd plaintiff; 2nd plaintiff is her paramour. 1st defendant is her son by her deceased husband Vairava Panikkhan. A feeble attempt was made to contest the finding that she was not the married wife of the 2nd plaintiff. It was argued that the Courts below have not given sufficient weight to the presumption arising from continuous cohabitation for a long time. This contention is untenable. The Courts have come to a distinct finding upon the evidence on record. The finding that Mukkayi was only a concubine of the 2nd plaintiff and that 1st plaintiff was her illegitimate daughter is correct.

It has not been disputed that the property in question represents the savings of Mukkayi after she began to live with the 2nd plaintiff. The point for decision is whether 1st plaintiff, the illegitimate daughter or 1st defendant, or the legitimate son, should succeed to this property. Mr. P. R. Ganapathi Aiyar, who argued the case for the legitimate son very ably contended that the ancient lawgivers did not contemplate rights of succession or inheritance in favor of illegitimate children excepting in a special instance to which I shall refer subsequently. I agree with him. It is true that in Brihat Parasara, chapter V, the sage says: "The son, begotten by one of equal caste (the illegitimate son) is the offerer of Pinda of his mother and is (in every respect) a son to her; but he is nothing to the begetter, as he is born of lust."

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"The son by a slave of a Sudra is fulfiller of desire and offers the Pinda. Twelve sons are mentioned by the Rishis. They are offerers of the Pinda, one after another in the order mentioned." From this Mr. Ghose draws the inference "that according to the rule of Brihat Parasara, chapter V, illegitimate as well as legitimate children inherit the estate of a woman, and if it is stridhana there is no reason to suppose that the ordinary rules of Hindu Law will not apply." (J.C. Ghose's "Principles of Hindu Law", p. 343). I do not think that this conclusion follows from the citation. It is well established that under the Mitakshara system of inheritance the offering of spiritual benefits is no index to rights of property or to preference. It is different under the Dayabagha. This may account for some of the decisions passed by the Calcutta High Court to which I shall refer later on. I am therefore of opinion that this text of Brihat Parasara is not indicative of the sage's view that illegitimate children inherit the property of their mother. The learned vakil for the appellant drew our attention to a text from Narada Smriti in which a Kanina's son was mentioned as entitled to succession. The passage in question enumerates the twelve classes of sons to which reference is made by every smriti writer. After the dictum of the Privy Council in *Thakoor Jhebnath Singh* v. *The Court of Wards* [1], which says that these texts are no longer regarded as binding authorities except in the case of adopted sons, it would be fruitless to discuss the matter further. I entirely agree with what Mr. Ghose says in his book on the subject." It appears that at the time of the Rig Veda, probably even before that (twelve kinds) of sons were recognised, but the Rig Veda says that they "cannot be accepted." "It is at least fully three thousand years when all these anamolous sons were prohibited and the extreme purity of Hindu family life established." The one apparent exception to this position is the rule regulating the rights of illegitimate children among Sudras. This deviation from the ordinary rule is traceable more to the theory of marriage among Sudras entertained by the Rishis than to a desire to introduce a special law regarding illegitimate children. According to Manu it was permissible for the twice born classes to take Sudra wives. The "Nishada" as the offspring of this union was called, had certain rights of inheritance. Brihaspathi's

1 (1875) 2 I. A. 163 at 165.

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text says that such children were only entitled to maintenance. Finally at the time of most of the Smrithis now recognised as giving the law, they were not recognised as possessing any legal status. But in the case of Sudras, an exception was made. I am of opinion that this treatment was due to the idea that marriage among them was not so strictly formal and ceremonial as in the case of the higher classes. Continuous concubinage was regarded as equivalent to marriage although the children of this irregular union did not rank equally with those with whose mother there was a formal marriage. The use of the term Dasiputra even in the case of Sudras is explicable on the ground that it is a relic of the days when the twice-born classes were allowed to take to them Sudra women as wives. This I conceive, is the origin of the rule regarding the shares of illegitimate children among Sudras. It is open to question whether, having regard to the advancement of the class known as Sudras the law which owes its conception to these ideas should still be allowed to prevail. The point has never been raised whether they are not obsolete and the texts have been commented upon by the highest Judicial tribunal as still in force. Whatever may have been the basis of the rule, it cannot apply to the present case. I have referred to this part of the case in some detail in order to show that illegitimate children of the class to which 1st plaintiff belongs are not within the pale of Hindu Law.

The main contentions of the appellant were two-fold: (*a*) That the Hindu Law did not cease to govern Mukkayi's property notwithstanding her unchastity and (*b*) that the special rules relating to the devolution of stridhanam applied to the property in dispute, and consequently the daughter ought to be performed to the son. The first ground is not contested by Mr. Ganapathi Aiyar. He argued that the unchastity of Mukkayi did not sever her relation with her legitimate child. He relied upon the analogy of the case in *Bagwan Koer* v. *J. C. Bose*[1] where the Judicial Committee of the Privy Council held in the case of a Sikh that strict conformity to rules of orthodoxy regarding diet and the ceremonials also is not a pre-requisite for a person being regarded a *Hindu*. The same principle has been enunciated regarding Brahmos; (Vide *Kusum Kumari Roy* v. *Satya Ranjan Das*[2]). Apart from analogy we have a recent pronounce-

1. (1901) I. L. R. 31 C. 11. 2. (1903) I. L. R. 30 C. 999.

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ment of the Calcutta High Court in *Hiralal Singh* v. *Tripura Charan Roy* [1] that a woman who adopts the life of a prostitute does not sever the tie which connects her with her kindred by blood. See also *Swarna Moyee Bewa* v. *Secretary of State for India in Council* [2] and *Narumayya Chetti* v. *Thiruvengadathan Chetty* [3]. 'This is the natural result of the earlier cases in this Presidency which have laid down that a fallen mother is entitled to inherit her son's property. (See *Kojiyadu* v. *Lakshmi* [4], *Angammal* v. *Venkata Reddi* [5] and *Vedammal* v. *Vedanayaga Moodelliar* [6]. It must therefore be taken as established that Mukkayee's property will devolve according to the rules of Hindu Law.

The second proposition that the 1st plaintiff being the daughter should be preferred to the 1st defendant the son, cannot be supported. In the Mitakshara, Chap. I, sections I and II dealing with inheritance, the words, son, grandson, and great grandson are used in their natural sense. In section XI of the same chapter, Placitum 2, the definition of a legitimate son is given. Then comes the special S. 12 dealing with the rights of illegitimate sons of Sudras. Placitum 2 speaks of the sons by the wedded wife and of the son of a female slave. It is thus clear that the author everywhere uses the term son in its natural and ordinary sense of legitimate son. The word daughters must be similarly understood. It is in chapter II, S. 11 that Vignaneswara treats of the separate property of a woman." In this section, the words son and daughter must have the same meaning as they have in the earlier sections. That would be the rule of interpretation according to English Law (see per Lord Denman in the *Queen* v. *The poor Law Commissioners for England and Wales in the matter of Holborn Union* [7] and *In re Kriskull Brewery Company Limited* and *Reduced* [8]. There is no difference in this respect between the English Law and the Hindu Law. The rule of interpretation is thus stated in adhikarana Kaumudi para. 50 (Mimamsa rules of Interpretation p. 276) "Multiplicity of sense to the same word must not be attributed." (अथ अनेकार्थत्वाकल्पना) if the words son and daughter are used in

1. (1913) I. L. R. 40 C. 650. 2. (1897) I. L. R. 25 C. 254.
3. (1912) 24 M. L. J. 223. 4. (1882) I. L. R. 5 M. 149.
5. (1902) I. L. R. 26 M. 509.
6. (1907) 18 M. L. J. 70; s. c. I. L. R. 31 M. 100.
7. (1838) 6 A. and E. 68 8. (1877) 5 Ch. D. 535.

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chapter II, s. XI, placita 8, 9 and 19 in their ordinary and natural sense, it is clear that there is no foundation for the suggestion that an illegitimate daughter is within those rules. Illegitimate children have no place in Hindu Law at least under the Mitakshara system except in the special case already referred to.

Another contention of the appellant was that a prostitute is a dancing girl as that term is understood in Southern India and that as daughters among this class inherit their mother's property, 1st plaintiff is entitled to the same rights. It has been laid down in a series of decisions by the late Justice Sir T. Muthusami Aiyar that rights of inheritance among those women are not governed by the precepts of the sages but by the custom which has grown among them. See *Venku* v. *Mahalinga*[1] and *Muthukannu* v. *Paramasami* [2].

It has been held in a recent case *Guddati Reddi Obala* v. *Ganapathi Kondana* [3] that a married woman taking to bad ways does not become a dancing girl. I do not desire it to be understood that I am in agreement with all the observations of one of the learned Judges who took part in that decision. There is a fundamental difference between rulings which lead to the encouragement of prostitution and those which tend to preserve civil rights to those who are the unfortunate offspring of immoral sexual connection. A custom is not immoral because it regulates rights of property among dancing girls. I need not pursue this topic any further. I am in agreement with the view taken in that case that the unchastity of a married woman will not bring her within the class of dancing girls so as to enable her to exercise all the rights which by custom and precedent have been allowed to them. This contention also fails.

A further argument was based upon an *obiter dictum* in *Subbraya Pillai* v. *Ramaswami Pillai* [4] which says: " No doubt in *Sivasangu* v. *Minal* [5], *Narasanna* v. *Gangu*[6] and in the goods of *Kaminee Money Bewah* [7] which is more to the point it was said that prostitution severed the legal relation. But we are unable to agree in this statement, though we think

1. (1888) I. L. R. 11 M. 393.
2. (1889) I. L. R. 12 M. 214.
3. (1912) 23 M. L. J. 493.
4. (1899) I. L. R. 23 M. 171 at 177.
5. (1889) I. L. R. 12 M. 277.
6. (1889) I. L. R. 13 M. 133.
7. (1894) I. L. R. 21 C. 697.

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that the decision itself, that when there is a competition between a degraded person and an undegraded person to the property of a degraded person, the degraded person has the preferential right, may be supported on equitable principles, referred to above." As regards the proposition that on equitable principles, the illegitimate offspring should be preferred to the legitimate, I must with great deference differ from the conclusion. I do not see that any consideration of equity can arise in favour of the illegitimate offspring as against the legitimate. If one were entitled to resort to other systems of Jurisprudence regarding the rights of bastards, it would be clear that they have no legal claim upon the estate of their parents. The Hindu Law contains no exception to this principle: and I fail to see how a right which is discountenanced by every civilized community can be regarded as being in consonance with Equity, Justice and Good conscience.

I have come to the conclusion that the claims of the appellant to be preferred to the 1st Respondent is not sustainable on any of the grounds stated by her vakil. I shall now, very briefly refer to the cases, cited before us. In many of those cases there was no argument whether illegitimate children are heirs under the Hindu Law. This is notably so with regard to S. A. No. 181 of 1911 to which I was a party. There the conflict was between two illegitimate children—a son and a daughter and we held that the daughter was to be preferred as the dispute related to Stridhanam property: The question whether illegitimate children can come in to intercept the escheat to the Crown is a point of some difficulty which it is not necessary to go into at present.

The earliest case to which our attention has been drawn is that reported in *Tara Munnee Dossee* v. *Motee Buneanee and another* [1]. In that case the opinion of the Pandits was that prostitution severed the tie of kinship; acting upon this Vyavasta, the Sudder Court held that the daughters who were born after the mother's fallen state and "who lived with the outcaste mother and had all things in common with her" should be preferred to the legitimate daughter. This opinion of the Pandits is no longer law and a decision based upon such an opinion cannot be regarded as an authority. In the case reported

1. 7 Sud. Diw. Ad. Rep. 273.

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in *Myna Bai* v. *Uttaram* [1], there was no competition between legitimate and illegitimate children. Both the contending parties were illegitimate. The learned Judges accepted the dictum of the pandits in *Taramanee's case* [2], as good law and decided that in the absence of preferential heirs they inherited the mother's property and to one another. This decision does not affect the present case. It may, however, be pointed out that the opinion of the Judicial Committee in this very case *Myna Bai* v. *Uttaram* [3], is more qualified regarding rights of succession to the mother's property than the conclusion of the learned Judges of the High Court. *Subbaraya Pilla* v. *Ramasami Pillai* [4] expressly laid down that prostitution did not sever the pre-existing legal relation, and dissenting from the dicta contained in the earlier cases decided that a stepson was entitled to succeed. In *Annayyan* v. *Chinnan* [5] the learned Judges held that an illegitimate son by a Sudra widow whose remarriage is forbidden had no right of inheritance. This is a distinct pronouncement in favour of the position that Hindu law does not recognise the rights of illegitimate offspring to succeed to their parents' property. Much reliance was placed on the recent case in *Narumayya Chetti* v. *Tiruvengadathan Chetti* [6] on behalf of the appellnat. The actual decision in that case was that the daughter of the daughter of a prostitute born to her in wedlock is to be preferred to the sons she begot after she became a prostitute. That opinion is in entire accordance with the conclusion at which I have arrived in this case. The statement that the illegitimate sons are entitled to succeed to their mother may be reconcilable on the ground that in the absence of preferential heirs and if the Crown does not intervene, they would succeed as blood relations. As I said before, the actual decision supports my view. In *Bhikya* v. *Babu* [7] it was held that in regard to ordinary property the divided brother's son excluded the illegitimate daughter. I fully agiee with the opinion of Chandravarkar J. in *Jagannath Raghu-Nath* v. *Narayan*[8] " that there is no authority whatever in the Hindu Law for the proposition, which is contended for by Mr.

1. (1861) 2 M.H.C.R. 196.
2. Sud. Diw. Ad. Ref. 273.
3. (1861) 8 M.I.A. p. 400 at p. 425.
4. (1899) I. L. R. 23 M. 171.
5. (1909) I. L. R. 33 M. 366.
6. (1912) 24 M. L. J. 223.
7. (1908) I. L. R. 32 B. 528.
6. (1910) I. L. R. 34 B. 553 at. 595

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Pradhan that, when the competition is between the husband and a son born of the woman by adulterous intercourse, that the son supersedes the husband as heir to the stridhanam." A Full Bench of the Calcutta High Court reviewed all the earlier authorities on the subject in *Hiralal Singha* v. *Tripuracharan Ray*[1] and arrived at the conclusion that prostitution did not sever the tie of blood previously existing. It is true there are cases in the High Court which seem to lay down that illegitimate children have rights of inheritance. This view may be traced to the prevailing theory in Bengal that the offering of oblations has to be taken into account in determining heirship. This principle does not affect those governed by Mitakshara, and consequently these rules are not binding on us.

Upon a review of the texts bearing on the question and of the decisions based on them my conclusion is that illegitimate children of a prostitute have no rights of inheritance under the Hindu Law as obtains in this Presidency, that the 1st Defendant is entitled to the property of Mukkayi and that 1st plaintiff's claim must fail.

I would dismiss the second appeal with costs.

PRIVY COUNCIL.

Present :—Lords Dunedin, Atkinson and Sumner, Sir John Edge and Mr. Ameer Ali.

[On Appeal from the High Court at Calcutta.]

Maharaja Surja Acharjya Bahadur ... *Appellant**

v.

Sarat Chandra Roy Chowdhuri ... *Respondent.*

Maharaja Surja Acharjya Bahadur v. Sarat Chandra Roy Chowdhuri.

Bengal Land Revenue Sales Act, (XI) of 1859—Indian Limitation Act of 1877, Art. 121—Proceedings before revenue officers—Evidence—Thakbust proceedings—Evidentiary value of—Practice—Comment—Findings of fact.

In a suit by a purchaser at a Revenue sale held under the provisions of Act XI of 1859 for recovery of possession, it was contended that the lands in question did not form part of the mahal purchased and even if it did, the right of the defaulter to the property had been extinguished by adverse possession and therefore no claim could be made to it by the purchaser.

Held on the first question that there was a concurrent finding of fact and in accordance with the established rule of the Board, their Lordships could not interfere unless it was shown that that finding was clearly wrong.

Allen v. *Quebec Warehouse Co.*, 2 followed.

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* 20th July, 1914.

1. (1913) I. L. R. 40 C. 650. 2. 12 A. C. 101.

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Held on the second question that a sale under Act XI of 1859 conveyed title free from all incumbrances, right acquired by adverse possession was only an incumbrance and as such limitation began to run against the purchaser only from the date his sale was completed and the suit being within twelve years of that date was not barred.

Where in proceedings taken before the Thakbust Deputy Collector in reference to disputes between neighbouring land—owners boundaries were fixed of the mouzas belonging to each, and in accordance with the thak then prepared, settlement also was subsequently made.

Held, that the proceedings were in truth determinations by public officials of the matters in dispute, all the parties interested being given the opportunity of making their claims, raising their objections and producing their evidence and though the parties to them were not estopped by the decisions arrived at as they would be in regular proceedings in courts of law, these determinations were of high authority and when acquiesced in by all the parties interested for a length of time and made the basis of important transactions, should not be disturbed unless upon the clearest proof that they were erroneous.

Appeal from a Judgment and Decree of the High Court dated May 22, 1908, affirming a Judgment and Decree of the Subordinate Judge of Raj Shahye, dated March 27, 1905.

The permanent settlement of 1793, of Pergana Shershabad was made with one Chandia Narayan Roy. In order to avoid paying the revenue, he claimed the lands in dispute as debottar (religious endowment), under Regulation II of 1819. The Government instituted proceedings for the resumption of the said lands. A decree was obtained in 1834, which was confirmed by the Special Commissioner in 1836. Being offered in settlement to the Zemindar of Shershabad who declined it, one Shib Chandra Chatterji was given an ijara for a term of 20 years. The boundary was fixed by the Deputy Collector, Mr. Bell, in the presence of some landlords of the neighbourhood in 1848. Eight years after a revenue survey was made of the Pergana Shershabad. In 1859, the mahal was permanently settled with Jogendro Narayan Roy. Sheik Enayobubah, Amin, together with other amins, were deputed to measure the mahal and they found some discrepancies in the survey map of 1848. A further survey was made in 1867. In 1891, the mahal was sold for arrears of Government revenue. The purchaser, the respondent, then claimed the mahal. This was contested by the appellant. Hence a suit was brought in the Court of the Subordinate Judge of Raj Shahye which decided in favour of the respondent. The High Court affirmed the

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decision of the lower Court. An appeal to His Majesty in Council was then preferred.

De Gruyther, K. C. with him *Dube* for the appellant contended that the appellant had remained in possession of the mahal in question since 1859, and therefore the claim of the respondent was barred by limitation. Both Courts in India had concurrently held that appellant was in possession of the mahal for over forty years. The title acquired by prescription could not be regarded as an encumbrance within the meaning of S. 37 of Act XI of 1859. The rights of the parties ought to be governed by the map of 1867, which was the final survey made by the Government. The map of 1848 was inaccurate and a map could not be taken as conclusive against a party. Art. 144 of the Limitation Act of 1877, applied and the period of limitation began running from 1859. Reference was made to *Jagadindra Nath Roy* v. *Secy. of State for India* [1] Act XI of 1859, and Indian Limitation Act, of 1877. Arts. 121 and 144.

Sir Erle Richards K. C. and *Dunne* for the respondent contended that both courts in India had concurrently found that appellants predecessor had no possession of the lands in question until after 1859, the date of the permanent settlement and the permanent settlement was made on the basis of those maps. The appellant's possession was subsequent to the permanent settlement of 1859, and therefore was an encumbrance liable to be set aside under S. 30 of Act XI of 1859. Art. 121 of the Indian Limitation Act of 1877, applied.

Reference was made to *Jagadindra Nath Ray* v. *Secy. of State for India* [1] and Indian Limitation Act of 1877 Art. 121.

De Gruyther in reply referred to Regulation I of 1893 and Regulation II of 1819, S. 11, and to *Jagadindra Nath Ray* v. *Secretary of State for India* [2].

The judgment of their Lordships was delivered by

Lord Atkinson.—This is an appeal from the judgment and decree, dated the 22nd May 1908, of the High Court of Judicature at Fort William in Bengal, affirming a judgment and decree of the 27th March 1905 of the Court of the Subordinate Judge of Rajshahye.

1. L. R. 30 I. A. 40. 2. 13 M. I. A. 467.

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The action out of which the appeal arises was brought by the respondent as purchaser at a sale held under Act II of 1859 in consequence of the non-payment by the owner of the Government assessment of the Kas Mahal Shyampur Paharpur situate within the Pergunna Sershabad, and No. 218 on the Touzi of the Maldah Collectorate, to recover possession of about 2,720 bighas of the Mouzah Nij Shampur alleged to form portion of the said Khas Mahal, the possession of which was withheld by the appellant, and for damages for mesne profits and further relief.

This sale was held on the 14th of January 1891 and duly confirmed on the 15th of March following.

The appellant relied upon two defences:—First, that the land, the possession of which was sought to be recovered, styled for convenience the land in dispute, did not form any portion of the mahal so purchased by the respondent, and, secondly, that even if it did, the appellant and those through whom he claimed had held possession of this land adversely to all persons having claims upon it continuously since, if not before, the year 1859 up to the present time, and that the respondent's claim was therefore barred by the Limitation Act. In anticipation of this second defence the respondent, in his plaint, alleged that this adverse possession, even if proved, was under the provisions of Act XI of 1859 only an incumbrance on the mahal purchased, that on sale this latter was vested in him free from all incumbrances, including the incumbrance thus created, and that consequently his right to recover possession was not barred by the Limitation Act.

It was admitted by Mr. De Gruyther, on behalf of the appellants, that on the failure of an owner to pay the Government assessment, his estate or interest in the land is forfeited, or rather, determined, and that under such a sale as that which took place in this case, what was sold was not the interest of the defaulting owner, but the interest of the Crown, subject to the payment of the Government assessment, and that therefore the time limited by the Limitation Act only commenced to run from the date of the sale, in this case the 14th of January 1891. If this be so, then, as the action was instituted on the 23rd of December 1902, the statutory period of 12 years had not elapsed before the

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latter date, and the claim of the respondent to recover was unaffected. This defence may be accordingly put aside. There remains the part and parcel question.

In order to appreciate the respective contentions of the parties litigant, and the rulings of the Courts below upon this question, it is necessary to refer shortly to the history of those properties of which the land in dispute is alleged to have formed part.

It was not, their Lordships think, disputed that at the time of the decennial settlement of Bengal, one Chandra Narayan Roy was the zemindar of the pergunnah Sershabad, and that the permanent settlement of 1793 was made with him in respect of that pergunnah. Neither was it disputed that at the time of this settlement Chandra Narayan Roy improperly returned as debottar lands, *i.e.*, lands devoted to religious purposes, and therefore unassessable to Government revenue, portions of eight mouzahs or villages forming portion of the pergunnah Sershabad. The Crown being misled by this untrue statement subsequently instituted proceedings under Regulation 2 of 1819 dealing with such matters, to deprive by way of resumption, Chandra Narayan Roy and his successor of the land so untruly described. The Crown represented by the Indian Covernment obtained a decree for resumption of this latter land on the 24th of December 1834, which was on appeal confirmed by the Special Commissioner on the 18th of June 1836. Possession of the misdescribed land having been thus obtained by the Government, they unified it and constituted it a Khas Mahal.

The main contention of the appellant has been that as Chandra Narayan Roy was the owner under the permanent settlement of the entire pergunnah of which the land so resumed formed part, the burden of proving that the land in dispute formed portion of the land so resumed rested upon the respondent, and that in so far as he failed to discharge that burden the lands in dispute must be taken to remain and be vested in the appellant, the successor in title to Chandra Narayan Roy, as his property. This contention, though in the main, in their Lordships' view sustainable enough, is in one respect mistaken, namely this, that it was competent for the Crown in the year 1859, when making the settlement under which the respondent

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in effect claims to have added to the resumed land, other land then belonging to it and made a grant of both combined. Such difficulty as the case presents arises altogether from one's inability to identify by metes and bounds the land actually resumed, and it is to this point the appellants' counsel have directed their lengthy and ingenious arguments.

Three attempts have been made to fix the boundaries of this land and to definitely ascertain its position and extent in 1838, in 1840, and in 1848 respectively. Both the Courts below have found that the last of the three, namely, that made in 1848, was so successful that the accuracy of the result then arrived at was not before them successfully impeached. It is embodied in the map of the survey of the village of Shyampur Paharpur surveyed in April 1848, a copy of which numbered Map 2 was given in evidence. The conclusions of the Courts below on this point being concurrent findings on an issue of fact the well established rule of this Board in such cases is, as stated by Lord Herschell in *Allen* v. *Quebec Warehouse Company*, 12 A. C., 101, this:—" Their Lordships do not consider " that the question they have to determine is what conclusion they " would have arrived at if the matter had for the first time come " before them, but whether it has been established that the " judgments of the Courts below, were clearly wrong." It is vital to the appellant's case that this should be shown on his behalf, for this reason, that after the decree for resumption of the misdescribed debottar lands had been enforced, and the Government assessment upon them fixed, Chandra Narayan Roy declined to take the grant of them offered to him by way of settlement, and thereupon a lease or Ijara settlement of them was made to one Shib Chandra Chatterji for a term of 20 years from the 1st of May 1838. On the expiration of this term, after some delay, a grant by way of final settlement of this Khas Mahal, was, on the 27th of September 1859, made to Jogendra Narayan Roy, a younger son of Chandra Narayan Roy. By successive transfers made from time to time this Mahal ultimately became vested in Udoy Chanda Bothra, the defaulting owner, upon whose failure to pay the Government revenue, it was, as already mentioned, sold to the respondent on the 14th of January 1891.

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Now the Subordinate Judge has found (p. 383) that the permanent settlement of this Mahal (Towzi No. 218) in September 1859 "was undoubtedly made upon the Thak and " Revenue Survey of 1847-1848." And the High Court have found as a fact (p. 410), that "the settlement of 1859 was made " on the basis of the survey map whether that map was right or " wrong, and whether it differed from the Tanabandi of 1840 " and the settlement of 1838 or not. That it was wrong there " is not a particle of evidence to show. It was always acted " upon, and must be taken to be the best evidence of what was " settled in 1859."

It was contended before their Lordships, as before the Courts below, that on a comparison of this survey map of 1848, with the proceedings in the Court of the Collector of Maldah on the 18th of June 1838, before Mr. Edward Latour, "in the " matter of the settlement of Khas Mahal Taraj Shyampur " Paharpur decreed under Regulation 2, 1819," and the Rubokari dated the 11th March 1840 of Mr. William Bell (Deputy Collector of the District of Maldah (p. 274, R,) and with the map prepared by him entitled Simanabundi map prepared by him, it would be found that the area of the land alleged to have been resumed according to the Revenue Survey was largely in excess of the 20,254 bighas which in the proceedings before Mr. Latour they are found to measure, that the survey was consequently plainly inaccurate, and the findings of both the Courts below as to its being unimpeachable were, therefore, clearly wrong. This contention is dealt with in the Courts below, and especially by the High Court in their judgment at pages 410 and 411. The so-called map prepared by Mr. Bell is in truth no map at all. It is a picture containing lineal measurements, made in different directions, estimated in Rasis, from a peg identified as one of those placed by Mr. Latour. No superficial areas were measured of the contents ascertained. In the order made by Mr. Bell on the 11th of March 1840 it is recited, amongst other things, that the boundaries of the Khas Mahal were taken by Mr. Latour by fixing pegs in certain places, and measuring from these pegs in certain directions, but that several of these pegs had been swept away, that at the time of Mr. Latour's settlement the River Bhagirathi

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flowed below and to the west of a certain palm tree treated by Latour as a landmark for the purpose of his measurements, namely the Panchatara palm tree at Dhoka, that there was Majh Dearah to the west of this river, and to the west again of that Majh Dearah the River Ganges flowed, that all the lands of this Majh Dearah were diluviated, that the two rivers became united, and the former bed of the latter river became Dearah. The physical features of the Khas Mahal thus became altogether changed. In addition, the question of this alleged excess in the survey was elaborately dealt with in the proceedings instituted in the Court of the Thakbast Deputy Collector of the district of Bhagalpur and Maldah in reference to disputes arising between the owners of the neighbouring Mouza of Sherpur Bhandar, and Ram Chandra Roy and others, as owners of this Mouza Shyampur Paharpur touching the boundaries between these mouzas. In the order made by the Deputy Collector on the 11th May 1848, the proceedings before Latour and Bell, respectively, are cited at length, the alleged excess is dealt with, and it is ordered that the Hadbast of the whole of this property in dispute should be made within the circuit of Shyampur Paharpur, that a perwana should be written to Syed Ata Hossein Peshkar, directing him to make the Hadbast thereof, and that a copy of the proceedings shall be forwarded to the Superintendent of Thakbast for final orders with respect to the excess lands. In pursuance of this order the case came before the Superintendent of Surveys for re-trial, and by his order, dated the 6th of March 1849, reciting again at length the proceedings before Messrs. Latour and Bell, and stating the cause to which this excess was due it was ordered that the appellant's objections should be disallowed, and that the lands which the Deputy Collector considered to be excess lands should be held to be intrinsically the land of Shampur Paharpur Government Khas Mahal belonging to Chandra Chatterji, the respondent in that case, and that the Thak prepared by the said officer should be maintained and confirmed. These last proceedings, like those preceding them, are in truth determinations by public officials of the matters in dispute, all the parties interested being given the opportunity of making their claims, raising their objections, and producing their evidence. The parties to them are, no doubt, not estopped by the decisions arrived at, as

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they would be in regular proceedings in courts of law, but these determinations are obviously of high authority, and when acquiesced in by all the parties interested for a length of time, and made the basis of important transactions, should not be disturbed unless upon the clearest proof that they are erroneous. Their Lordships have not found that the comparison of Bell's map with the survey map is sufficient to lead them to the conclusion that the latter is, save possibly in one respect, erroneous, nor have they discovered anything in any of the proceedings subsequent to the year 1848 to lead them to think so. The bed of the Ganges is apparently included in the mahal according to the survey map, but this does not form part of the lands in dispute, and if it belonged to the Crown, as it is contended it did, it would be vested in the purchaser by the settlement of the 27th of September 1859. The finding of both courts that the survey formed the basis of the settlement has not been impeached, and Their Lordships, on full consideration of all the evidence, find themselves unable to come to the conclusion that the other concurrent finding of fact, namely, that the survey map is accurate, was clearly wrong. They are, therefore, of opinion that the judgment and decree appealed from should stand, and that this appeal should be dismissed with costs, and they will humbly advise His Majesty accordingly.

Solicitors for appellant :—*T. L. Wilson and Co.*

Solicitors for respondent :—*W. W. Box and Co.*

PRIVY COUNCIL.

Present :—Lords Moulton and Parker of Waddington, Sir John Edge and Mr. Ameer Ali.

[On appeal from the High Court at Calcutta.]

Ekradeshwar Singh ... *Appellant**

v.

Musammat Janeshwari Bahuasin ... *Respondent.*

Ekradeshwar Singh *v.* Musammat Janeshwari Bahuasin.

Hindu Law—Family custom—Babuana—Sohag—Grants for maintenance—Succession only to male descendants in male line—Exclusion of females and daughters — Partition notwithstanding—Operation of custom—Not excluded by showing one case in which custom not followed— Descent to all sons, not to the

* 22nd July 1914.

Ekradeshwar Singh v. Musammat Janeshwari Bahuasin.

eldest alone—Putra Pautradi Krame, whether words of general inheritance or limitation—Maintenance of defendant, provision for, in decree—Mesne profits—Refusal of—Maintenance, owing to non-offer of.

In a suit by a junior member of the Durbangha family for the recovery of his deceased brother's share in certain Babuana and Sohag properties partitioned between them during the latter's lifetime, from his widow.

Held: That by the custom of the raj, such properties descended only to the male descendants of the grantees in the male line and females were excluded from succession.

Held: further that the operation of the custom was not excluded by the fact that there was a complete partition between the brothers.

Held also: that immoveable properties purchased out of the income of the properties formed accretions to them and were claimable by the plaintiff.

A well-established family custom cannot be defeated by the fact that the custom was not enforced in one isolated instance.

Though the words "Putra Poutradi Krame" are ordinarily words of general inheritance, having regard to the custom, when applied to Babuana grants, they could not be regarded as such but only as words of limitation.

Nature of Babuana and Sohag grants considered.

The defendant being admittedly entitled to maintenance and there having been no substantial offer of adequate maintenance by the plaintiff before suit. Their Lordship disallowed the claim for mesne profits and also declared by the decree the proper rate of maintenance payable to the defendant.

Held: upon the evidence in the case that the Babuana grants descend to all the sons of the grantee and not to the eldest alone as assumed in *Durgadut Singh* v. *Maharaja Sir Ramashwar Singh Bahadur* (1).

Appeal from the Judgment and Decree of the High Court, dated August 2nd, 1909 reversing a Judgment and decree of the Additional Subordinate Judge of Bhagalpur, dated August 15, 1908.

In 1850, Rudar Singh, then Rajah of Durbhanga granted to his son Babu Nitreshwar Singh the pergana Nisankhpur Kusha and to Mussamat Netrabati Babuasin the wife of the latter, Mouza Madhapur, as a Sohag gift. The income from the properties was large and further lands were bought. Nitreshwar left two minor sons Ekradeshwar and Janeshwar, Netrabati having previously died. On coming of age in 1896, these two bothers separated. In 1906, Janeshwar died and his widow Mussamat Janeshwari Bahuassin took possession of his properties. Ekradeshwar then claimed the properties of his brother by virtue of the family custom by which females were excluded from inheritance and brought the suit in the capacity of a surviving co-parcener under the Hindu Law or in the alternative

1. (1909) I. R. 36 I. A. 176, S. C. 19 M. L. J. 267.

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as the nearest male heir. Janeswari Bahuasin contended that though there was a Kulachar or family custom affecting the succession by females to the Durbhanga Raj itself, there was no such custom which governed or affected the devolution or succession of or to Babuana or Sohag properties and that they were governed in that case by the Mithila School of Hindu Law. Babuana properties were self-acquired in the hands of the original grantee and were subject to alienation by will. The Subordinate Judge decided as did the High Court that there was no right of survivorship as alleged by Ekradeshwar the brothers being separate in interest, but on the question of succession by virtue of a customary incident of the property he held that the widow's right of inheritance was excluded. The High Court reversing the finding of the lower Court, decided against the existence of such family custom. An appeal was then preferred to His Majesty in Council.

Sir Erle Richards K. C. and Dunne for the appellant contended that the Kulachar or family custom excluding females was fully established by the evidence and findings of the courts in India. The Raj of Darbhunga was an ancient impartible Raj descendible to a single heir in the lineal male line. Babuana and Sohag grants were made to male and female members respectively and the lands descended according to the family custom. Courts in India have found that the Babuana and Sohag properties never ceased to remain a portion of the Raj. In the sanad by Rudar Singh, dated Feb. 13, 1850, the grant was by way of maintenance as Babuana. The amount payable as Government Revenue was to be paid to the Raj, which in its turn was to pay it to the Government. There were grants to females which were for life and to revert to the Raj after their decease. The Sohag property in question was given to Bahuasin and her sons and grandsons. The whole custom of this family shewed that females were excluded from inheritance. The High Court said that when the partition was effected, it changed the nature of the grant. There were cases in which widows did not succeed. There were two cases of widows not succeeding, one in 1856, and the other in 1858. In 1859, there was another case that of Basdeo's widow,

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There were cases of Tulapat's widow and that of Raja Ram's widow who were excluded from inheritance. Excepting the case of Ghanlata who was the widow of Ghansham Singh there was not a single case in the family in which a widow had succeeded to her husband's property in conformity with the ordinany rules of the Hindu Law. The custom of excluding females from inheritance was to govern the succession to Babuana and Sohag properties and all accretions thereto. The partition between the appellant and his late brother could not and did not displace or affect the Kulachar as a rule of succession in the Durbhanga Raj. The Babuana and Sohag properties were in the hands of the grantees and their descendants as ancestral property and subject to the same rule of succession as the Raj was, from which it was never detached as otherwise the very object of such grants, to keep the grantees in a condition of respectability would be defeated.

Reference was made to *Babu Ganesh Dutt Singh* v. *Maharaja Maheshwar Singh* [1], *Rameshwar Singh* v. *Jibendra Singh and others* [2], *Ram Kanta Das Mahapatra and others* v. *Chowdhuri Shyamanand Das Pahraj Mahapatri* [3], *Ramchandra Marwari* v. *Modeshwari Singh* [4].

De Gruyther K. C. and *Kenworthy Brown* for the respondent contended that the first question was whether grants to Babus by Rajas of impartible estates were to be regarded as ancestral or self-acquired. Grants took the properties out of the Raj and therefore the Babuana and Sohag grants were absolute estates and admittedly not impartible as the Raj itself. The appellant admitted that although the Babuana properties were not descendable to any female or to any descendant through a female, the properties were not governed by the rule of the primogeniture. The estate was heritable and alienable governed by Hindu Law. It was not ancestral property but ordinary self-acquired property and would pass according to Hindu Law. There was no custom which excluded the widow from succeeding to her husband. There was a custom that the lands reverted to the Raj in the event of the failure of the male line.

1. (1855) 6 M.I.A. 164, 197.
2. (1909) L.R. 36 I.A. 176, 177.
3. (1909) L.R. 36 I.A. 49.S.C. 19 M.L.J. 239
4. I.L.R. 33 C 1128.

Lord Moulton:—We have evidence of members of family that no female ever succeeded.

The custom was that as long as males were in existence possession lasted and after their death passed on to the females.

The case was governed by the Hindu Law and not by custom.

Lord Moulton.—You say that custom cannot be proved unless there are many instances and those cannot be in existence unless there is custom.

The onus to prove custom lay on the appellant. The presumption was in favour of the Hindu Law. The Courts in India rightly held that the appellant was not entitled to succeed by right of survivorship. The High Court was right in holding that the custom alleged by the appellant was not proved and the decision of the Subordinate Judge to the contrary was based on inadmissible evidence by Sec. 32, cl. 4 of the Evidence Act. The statement of the Raja of Dharbunga was made after the controversy arose. The appellant was not entitled to lands purchased with the proceeds of the Babuana and Sohag properties nor to movables.

Reference was made to *Babu Ganesh Dutt Singh* v. *Maharaj Mateshwar* [1], *Kameshwar Singh* v. *Jabendra Singh* [2], *Ramchandra Marwari* v. *Modeshwar Singh* [3], *Laliteshwar Singh* v. *Bhabeshwar Singh* [4], and Mayne's Hindu Law, Secs. 270, 275 and 540.

Sir Erle Richards K. C. replied.

The Judgment of their Lordships was delivered by

Sir John Edge.—The suit in which this appeal to His Majesty in Council has arisen was brought on the 20th December 1906, in the Court of the Subordinate Judge of Bhagalpur, by Babu Ekradeshwar Singh, who is the appellant here, against Musammat Janeshwari Bahuasin, who is the widow of the plaintiff's younger brother Babu Janeshwar Singh. The plaintiff and his brother were sons of Netreshwar Singh, who was a younger son of Maharaja Rudar Singh of Durbhanga.

1. (1885) 6 M.I.A. 164.
2. (1909) L.R. 36 I.A. 176.
3. (1906) I.L.R. 33 C. 1128.
4. (1908) I.L.R. 35 Cal. 823.

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The plaintiff claimed a declaration that he was entitled to the properties in suit which were owned by and in the possession of his deceased brother, a decree for possession of those properties, for mesne profits, and other reliefs. The property claimed consisted of the share which the plaintiff's brother had obtained on a partition between them of immovable property which had been granted by a Babuana grant to their father, of immovable property which had been granted by a Sohag grant to their mother, of immovable property alleged to be accretions to the Babuana property, and of accumulations. The plaintiff's claim was based on an alleged custom in the family of the Durbhanga Raj by which widows and other females were excludep from all rights to the possession of lands held under Babuana grants or Sohag grants. It was alleged by the plaintiff that the properties which had been purchased by his father and by his brother had been purchased with profits which had been derived from the Babuana property and were to be treated as accretions to that property. The defendant, who was in possession, denied the existence of any such custom and by her written statement put the plaintiff to proof of his title to possession.

The Durbhanga Raj is an ancient and impartible Raj, and by the Kulachar, or family custom, the right of succession to the gaddi and to the properties of the Raj Reasat descends according to the rule of lineal primogeniture. The younger sons of a Maharaja of Durbhanga are styled Babus, and by the Kulachar each younger son is entitled by way of a Babuana grant to a portion of the Raj Reasat for the maintenance of himself and his male descendants in the male line, and the wife of a younger son of a Maharaja of Durbhanga gets, by way of a Sohag grant, the usufruct of a portion of the Raj Reasat for the maintenance of herself and her male descendants in the male line. In each case the property, village or villages, granted, continues to form part of the Raj Reasat, from which it is never separated; it is entered in the Government Revenue Registers under the name of the Maharaja for the time being of Durbhanga as the proprietor, and the property so granted reverts to the Maharaja for the time being of Durbhanga on the failure of male descendants in the male line of the grantee. Babuana grants and Sohag grants differ essentially in their nature from absolute grants, and are subject to

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the Kulachar under which they are authorised and in accordance with which they are made. The family of the Durbhanga Raj are Hindus, and, except in so far as customs of the family and its branches exist and apply, the members of the family are governed by the Mithila School of Hindu law, which, so far as it applies to this case, may be taken as following the Mitakshara of the Benares School.

Maharaja Rudar Singh of Durbhanga, by a Babuana grant granted to his son Babu Netreshwar Singh by way of mainte- nance as *Babuana*, the dehat milkiat appertaining to pergunnah Nisankhpur Kusha, together with *dasturat malikana.* That grant has not been put in evidence in this suit, but the fact that the grant was made is proved by a sanad, dated 7th Phalgun Badi 1257, which was granted by Maharaja Rudar Singh to his eldest son Maheshwar Singh. That sanad was registered in the registry of Mozuffarpur on the 13th February 1850. The sanad shows that Babuana grants had also been made by Maharaja Rudar Singh to two other of his younger sons, and contains the following directions:—

"The said Maharaj Kumar Babus shall continue in possession of the said " pergunnahs, and the Government revenue, which shall be due on account thereof, " will be paid by them to you, and you will pay the same to the Government along " with the Government revenue of the Raj. The said Babus shall live in a style " befitting the position of Babus, and you shall treat them according to your " sense of propriety as a Raja, and in a manner befitting their position as Babus."

On the death of Maharaja Rudar Singh his eldest son Maheshwar Singh succeeded to the gaddi and the Raj Reasat, and became Maharaja of Durbhanga. Maharaja Maheshwar Singh by a sanad, dated 6th Aghan Sudi 1259 Fasli (A. D. 1852), granted to Bahuasin Soshagin Mouzah Madhapur as a Sohag gift. As translated in this record the sanad contains the following clause:— "You and your sons and grandsons, &c., shall " cultivate or get cultivated the mouzah aforesaid, and enjoy " the usufruct thereof yourself." Bahuasin Sohagin was the wife of Babu Netreshwar Singh and the mother of the plaintiff, and of his late brother. She is referred to in the record as Musammat Netrobati Bahuasin.

The plaintiff's mother died in 1879. His father died in 1883, when the plaintiff and his brother were minors. Until the separation of the brothers and a partition between them, the

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effect of which will later be considered, the plaintiff and his brother were co-parceners in the Babuana property, which, according to Hindu law, was in their joint possession, ancestral property, subject, however, to such family custom as applied to it. Similarly, the Sohag property was ancestral property in which, at the time of the separation and partition, the plaintiff and his brother were co-parceners. The plaintiff came of age in 1888, and was put in possession of the Babuana property and the Sohag property as manager for the family consisting of himself and his brother. The younger brother came of age in 1896. Soon after the younger brother came of age disputes arose between the brothers, they separated and each brought a suit against the other to obtain partition of the property in which they were co-parceners. Decrees for partition were made, and in 1900 the property was partitioned between the brothers.

The younger brother died without issue on the 18th April 1906, leaving surviving him his wife, who is the defendant to this suit. On her husband's death she took possession of the property which he held at the time of his death. Her right to the possession of that property is disputed in this suit on the ground that by a family custom she as a widow, although entitled to money maintenance, was excluded from any right to the possession of that property.

The *Kulachar* or family custom under which the plaintiff claimed is thus described by him in his plaint:—

"1. That the family, to which the plaintiff and the defendant's husband "belong, has held from time immemorial the properties known as Raj Reasat of "Durbhanga, and constituting an impartible Raj, and is governed by the Kula-"char or family custom in the matter of succession and inheritance as hereinafter "mentioned.

"2. That by such Kulachar and family custom, females, either widows or "daughters heirs in the female line, are altogether excluded from succession.

"3. That so far as the said Raj Reasat is concerned, the same descends accord-"ing to the rule of lineal primogeniture on the eldest son of the last holder, the "other sons obtaining portions of the Raj for maintenance and support by way of "Babuana grants.

"4. That in the event of the last holder of the said Raj dying without male "issue, natural or adopted, his younger brother, or, in the absence of brother, his "nearest agnate, according to the rule of lineal primogeniture, succeeds to the said "Raj to the exclusion of widows and other females.

"5. That the incidents of the said Babuana properties are, that the name of "the Maharaja Bahadur of Durbhanga for the time being stands recorded in the

"Government Register as the proprietor of the mouzahs comprised in the said pro- "perties, and it remains a part and parcel of the said Raj, and the Babus holding "the said properties pay the Government revenue and other public demands pay- "able in respect of the said mouzahs to the said Maharaja who pays the same to "Government; and that said Babus and their male heirs in the male line remain in "possession and enjoyment of the said mouzahs; and that on the extinction of the "heirs male of the grantees in the male line, the said mouzahs together with all "acquisitions, movable and immoveable, made from the income thereof, revert to "the said Raj.

"6. That by virtue of the Kulachar aforesaid and the incidents of the said "Babuana grants, on the death of any male descendant in the male line of any "Babu or younger scion of the said Raj family to whom a Babuana grant as afore- "said has been made, without male issue, natural or adopted his nearest agnate "among the other male descendants in the male line of the said grantee succeeds "to his share in the said Babuana grant together with all accretions thereto as "aforesaid.

"7. That in accordance with the custom of the family of Raj Durbhanga "usufructs of some village or villages out of the Raj properties are granted to "females of the family on the occasion of their marriages or other ceremonies. The "rule of succession and other incidents connected therewith are the same as that "of Babuana; the villages granted to them descend to males of their body in un- "broken male line; and on the extinction of male issue the said village or villages "revert to the Raj."

The plaintiff put forward the following as an explanation of the separation and partition between him and his brother:—

"16. That after the husband of the defendant attained majority, and in conse- "quence of disagreement between him and the plaintiff, they separated and divided "amongst themselves the major portion of the aforesaid properties and *Sohag* "property merely for the sake of convenience and undisturbed enjoyment of usufruct "without prejudice to their co-parcenary rights as junior members of the Raj Dur- "bhanga family; but they being of junior branch of the Durbhanga Raj family, "their status as co-parceners in the Durbhanga Raj family did not come to an end. "nor did such partition in any way affect or alter the nature and incident of their "tenure of the said grant.

"17. That the husband of the defendant died on the 18th April 1906 without "any issue and leaving plaintiff his full brother, and the defendant his widow.

"18. That according to the Kulachar or family custom referred to above "obtaining in the Durbhanga Raj family, including the junior branches thereof, "the defendant has no right or title to the estate left by her husband; and the "plaintiff as the surviving male heir in the family of the grantee Maharajkumar "Babu Nitreshwar Singh and also as a co-parcener in the Durbhunga Raj family, "is entitled to succeed to and to the possession of the estate left by the husband of "the defendant, representing his share of the said grant and accretions thereto; "and that the defendant is only entitled to suitable maintenance out of the same; "and that she is not entitled to succeed to and possess the said estates, properties "and effects as is falsely pretended by her."

It may be observed that a separation between members of a joint Hindu family followed by a partition between them of the

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ancestral property which would not put an end to their co-parcenary rights in the property is unkown to the law. As the plaintiff was a party to the suits in which the decrees under which the partition was effected were made he is not in a position to deny as against his brother's widow that partition did in fact take place. He may, however, have intended by his plaint to represent that the partition between him and his brother had not the ordinary legal effect of a partition between co-parceners, and that the custom of the Durbhanga Raj family which would exclude widows from the succession when the members of a branch remained joint would equally apply to exclude the widow of a separated member of a branch.

The Subordinate Judge found, as the fact was, that there had been complete separation between the brothers in food, worship, and estate, and consequently that at the time of the death of the younger brother in 1906 the plaintiff had no co-parcenary interest in any of the property in suit. The correctness of that finding has not been questioned in this appeal. The Subordinate Judge also found that there is a valid custom in the junior branches of the family of the Durbhanga Raj, including the family to which the parties to the suit belong, that widows do not inherit Babuana properties, and that the succession and inheritance in the case of Sohag grants are governed by the custom which governs the succession and inheritance in the case of Babuana grants, and he held that notwithstanding that there had been complete separation between the brothers the custom applied. He gave the plaintiff a decree for possession of some of the immovable properties which the plaintiff claimed, for certain movable property and for mesne profits. From that decree the defendant, the respondent here, appealed to the High Court of Judicature at Fort William in Bengal. The learned Judges before whom the appeal came found that although the subjects of Babuana and Sohag grants would on the failure of male heirs in the male line of the grantee revert to the Maharaja of Durbhanga for the time being, the plaintiff, had failed to prove any custom by which the widow of a childless and separated Babu was not entitled during the continuance of Babuana or Sohag grant to hold for a Hindu widow's interest the property which her separated husband had held under a Babuana

or Sohag grant, and, consequently, applying the rules of the ordinary Hindu law, those learned Judges decided that the plaintiff had failed to prove as against the defendant that he was entitled to the possession of any of the property in suit, and by their decree set aside the decree of the Subordinate Judge and dismissed the suit. From that decree this appeal to His Majesty in Council had been brought.

Some statements deposed to by witnesses who were called, and some of the documents which were put in were not admissible as evidence in this suit. It seems to have been overlooked at one period of the suit that evidence, oral or documentary, as to statements of a deceased person as to the custom in a family is not admissible if it appears that such statements were made after a controversy as to the custom had arisen. There is, however, abundant evidence to prove what was the custom in this family of the Durbhanga Raj which applied to Babuana grants and Sohag grants and to accretions to Babuana immovable property.

Their Lordships are of opinion that the Subordinate Judge arrived at a correct conclusion on the evidence that the custom governing the succession to and the inheritance of Sohag property is the same as the custom governing the succession to and the inheritance of Babuana property. In the High Court Mr. Justice Richardson held that Sohag property is similar in its nature and incidents to Babuana property, and is governed by similar considerations, and Mr. Justice Sharfuddin did not dissent from that view. Their Lordships find that, except that a Babuana grant is made to a male while a Sohag grant is made to a female, there is no difference so far as the right to succession to the property is concerned between a Babuana grant and its incidents and a Sohag grant and its incidents. In the one case the grant is made for the benefit of the grantee and his male descendants in the male line, in the other case the grant is for the benefit of the grantee and her male descendants in the male line; in each case, females, widows and daughters and the descendants of daughters are by the custom applying to such grants excluded from the succession, and on the failure of such male descendants in the male line the property granted reverts to the Maharaja of Durbhanga for the time being. The general

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evidence as to custom upon which Their Lordships have found that widows are excluded from the succession to Babuana and Sohag properties, includes and is strongly supported by instances in this family of Durbhanga of widows, who would otherwise have been entitled to a Hindu widow's interest, having been excluded from, or not having claimed, possession on the death of their husbands.

In some of the Babuana sanads which are in evidence in this suit the words which have been regarded in the Court below as words of limitation are in the vernacular *auras putra poutradik*. As to those sanads Mr. Justice Sharfuddin in his Judgment in this case said :—

"From the copies of sanads (Exhibits 20 A, 20 B, 20 C, 20 D, and 20 E) it is "clear that female children and daughters' sons were excluded from the inherit-"ance of the Babuana properties. The expressions used in the sanads are *auras* "*putra poutradik*, which means sons born of the loins. I take it to mean that so "long as there is one descendant of this description, the properties granted are "not to revert to the Raj."

That construction is consistent with the evidence as to those Babuana grants to which Their Lordships attach importance, and Their Lordships are unable to regard them as words of general inheritance which would include female as well as male heirs. In this connection the attention of Their Lordships has been drawn to the judgment of this Board in *Ram Lal Mookerjee* v. *The Secretary of State for India in Council and others* [1] in which it was held that in Bengal in a gift to a man the vernacular words *putra poutradi krame* would be read as words of general inheritance, and would include female as well as male heirs where by law the estate would descend to such heirs. Babuana grants could not be made under the ordinary Hindu law, but they are authorised by the custom which excludes females from the succession. Their Lordships must regard the words *auras putra poutradik* as used in these sanads as words of limitation consistent with the custom, and not as words of general inheritance.

Their Lordships having found that under the custom which applies to the branches of this family widows are excluded from all right to succeed to *Babuana* property or to *Sohag* property, it is necessary to consider whether that custom, which has been proved to apply where the members of the branch remain joint,

1. (1881) L. R. 8 I. A. 46.

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can, without evidence that it has been applied where the members of a branch have separated in food, worship, and estate, be held to exclude the widow of a childless and separated member from a Hindu widow's interest in the *Babuana* and *Sohag* properties which had been held by her husband as his separate property. In this case it is clear that until the brothers separated the *Babuana* and *Sohag* properties were held by them, subject to the terms of the grants and the custom, as joint ancestral property in which their rights were those of coparceners.

The right under the Mitakshara of coparceners in Hindu ancestral property to have the joint property partitioned is now unquestionable unless the property is held under a grant, or is subject to a custom, which expressly or impliedly prohibited any partition of the property which would have the effect of defeating the object of the grant or the custom. It has been contended that there can be no partition of *Babuana* or of *Sohag* property in this family of Durbhanga, and that to allow that Babuana and Sohag property could be partitioned would be to frustrate the very object with which Babuana grants and Sohag grants have been made and the very object with which the custom in the family of the Durbhanga Raj authorised the making of such grants by the Maharaja for the time being of Durbhanga, that object being to provide by a grant of lands suitable maintenance, having regard to the position of the family, for the grantee, and his or her male descendants in the male line, and to relieve the Maharaja of Durbhanga from the possibility of having from time to time to provide for such descendants maintenance by gifts of money.

In support of the contention that there can be no partition of Babuana property reference has been made to the judgment of this Board in *Durgadut Singh and others* v. *Maharaja Sir Rameshwar Singh Bahadur* [1]. That case related to a *Babuana* grant in this family of Durbhanga. Their Lordships in that case stated that those who for the time being are entitled to be maintained out of *Babuana* property "cannot "have it divided amongst them by proceedings in the nature "of partition." The statement referred to, although doubtless correct, cannot be regarded as an authority binding in this appeal, as it was made upon a concession as to facts which

1. (1909) L. R. 36 I. A. 176 S. C. 19 M.L.J. 567.

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were not proved, and which certainly would not be proved by the evidence in this suit. The concession which was made by counsel in that case was that lands which had been granted to Kirkat Singh by a *Babuana* grant descended to the eldest male heir of the grantee to be held, or managed, by the person to whom they descended for the maintenance of the family. The evidence in this suit proves that *Babuana* and *Sohag* lands descend in the family of Durbhanga, not to one male heir only, but to all the existing male heirs in the male line of the grantee as co-parceners.

Apart from the general evidence that females are excluded from the succession to *Babuana* and *Sohag* properties there is little evidence, and that apparently merely evidence of opinion, that the rule as to the exclusion of females from a succession applies where there has been a partition. It is probable that there have been few instances in this family of Durbhanga of a separation in food, worship and estate in which this question as to the right of a female to succeed to Babuana or Sohag property could have arisen. It is doubtful that with the exception of the present case and the case of Musammat Ghanlata, who was the widow of Babu Ghansham Singh, there has been any case in which a separated and sonless member of a branch of the Durbhanga family had a wife who survived him.

Musammat Ghanlata's case occurred in a branch which descended from Maharaja Madho Singh, from whom the present Maharaja of Durbhanga descended through Maharaja Rudar Singh who made the Babuana grant in this case. Ramput Singh, who was a younger son of Maharaja Madho Singh had a Babuana grant; he had six sons of whom was Dharamput. Dharamput had by his wife Dharamlata a son Ghansham Singh, who had by his wife Musammat Ghanlata two daughters but no son. Ghansham's daughters married and had male issue. Ghansham Singh separated from his uncles and cousins and obtained possession of his father's sixth share of the Babuana property of that branch. On Ghansham Singh's death his widow Musammat Ghanlata entered into possession of his one-sixth share of the Babuana property as hers by right of inheritance, and in the presence and with the knowledge of the

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agnates of her deceased husband she was registered as the proprietor of that one-sixth share, and held possession of it for 16 years until she died. A few days before she died Musammat Ghanlata executed an ekrarnama in which she stated that by custom she had no title to the share, and alleged that she had been permitted to hold possession of it merely by way of maintenance. It is obvious that she executed the ekrarnama as a compromise to secure, if possible, 400 bighas of the lands for her grandsons, who were sons of her daughters. No explanation satisfactory to their Lordships of the reason why Musammat Ghanlata was allowed to take and to hold possession of her late husband's one-sixth share, and why the custom was not enforced in her case, has been forthcoming. It is possible that, owing to the novelty of the position, the parties who were concerned were in some doubt as to their rights under the custom. However that may have been, their Lordship are of opinion that a well-established custom in the family cannot be defeated by the fact that in one case the custom was not enforced. The subsequent history of Ghansham's one-sixth share, so far as it is known to their Lordships, is inexplicable.

Their Lordships hold that the custom in this family of the Durbhanga Raj by which females are excluded from the succession to *Babuana* property and to *Sohag* property applies in this case notwithstanding the separation and the partition which was effected by the plaintiff and his late brother, and consequently that on the death of his brother the plaintiff became entitled to the possession and enjoyment of the *Babuana* property and of the *Sohag* property which his brother held at the time of his death. Their Lordships agree with the Subordinate Judge, for the reasons stated by him, that the immovable properties which were acquired from the income and profits of the Babuana properties are to be considered as accretions to the Babuana properties, and they hold that the plaintiff became, on his brother's death, entitled to the possession and enjoyment of those immovable properties. Their Lordships are not satisfied that the plaintiff proved a title to the possession of any of the movable property or accumulations which he claimed. The defendant was and is entitled to money maintenance, and as no

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substantial offer of adequate maintenance was made, their Lordships consider that the claim for mesne profits should be disallowed.

Their Lordships will humbly advise His Majesty that the decree of the High Court should be set aside; that the appellant should have a decree for the possession of the immovable properties in suit excepting Nos. 15, 19, and 21 of Schedule 3, and No. 10 of Schedule 4 (A), and that in other respects the decree of the Subordinate Judge should be varied by dismissing the suit; that it be declared that the respondent is entitled to be paid monthly during her life, unless the property reverts in the meanwhile to the Maharaja of Durbhanga for the time being, future maintenance at the rate of Rs. 15,000 per annum, such maintenance to be a charge upon the immovable properties which the appellant will recover by the order in this appeal; and that no costs be allowed to either side in the High Court or in the Court of the Subordinate Judge.

Their Lordships consider that if the appellant and his brother had not effected a partition this litigation might have been avoided. No costs of this appeal will be allowed to either side.

Solicitor for appellants :—*W. W. Box and Co.*

Solicitor for respondents :—*T. L. Wilson and Co.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Sankaran Nair and Mr. Justice Ayling.

Ratnasawmi Chetty, minor by his next friend, Velayudam Chetty ... Appellant* (*Respondent*)

v.

Ratnammal and another ... Respondents (*Petitioners*).

Ratnasawmi Chetty v. Ratnammal

Civil Procedure Code, Order XXIII, R. 2—Compromise—"Relating to the subject matter of the suit"—Suit to set aside a will—Decree for payment to defendant Rs. 2750—Jurisdiction to be tested by reference to plaint and not to reliefs granted—Objection to validity of decree—Not to be taken in execution.

In a suit to set aside a will as a forgery brought in the Munsiff's Court, a razinama was entered into by which *inter alia* a sum of Rs. 2,750 was made payable by

* A. A. A. O. No. 72 of 1913. 17th February, 1914.

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the plaintiff to the defendants and a decree was passed in terms of the Razi, but when execution was taken out, the plaintiff objected that the decree ought not to have been passed in terms of the Razi as it did not relate to the subject matter of the suit, (none of the terms dealing with the will), and also that to give a decree for Rs. 2,750 was beyond the pecuniary jurisdiction of the Munsif.

Held that as presumably the plaintiff abandoned his claim as regards the will in consideration of the reliefs awarded to him, all the terms of the Razi could be properly embodied in the decree,

That the pecuniary jurisdiction of the Court to make the decree was to be judged by reference to the plaint and not by reference to the reliefs awarded,

That in any view, neither of those objections was available to the plaintiff as those objections related to the validity of the decree and could not be gone into in execution.

Appeal against the order of the District Court of South Arcot, dated the 25th August 1913, in Appeal Suit No. 15 of 1913 preferred against the order of the Court of the District Munsif of Panruti at Cuddalore, dated the 18th November 1912, in E. P. No. 2, M.P. No. 695 of 1912 in O.S. No. 745 of 1907.

K. R. Subramania Sastri for Appellants.

M. Narayanaswami Aiyar for Respondents.

The Court delivered the following

Judgment:—A suit was brought to set aside a will as a forgery. The plaintiff who was a minor by his next friend and the 2nd defendant who was also a minor by his guardian applied to the Court for leave to compromise the suit on the terms set forth in a Razinamah. As it appeared to the District Munsif that the compromise was fit and proper and for the benefit of the minors the Court gave its sanction, and with the consent of the parties passed a decree in terms of the Razinamah. The decree contained the following words :—"It is ordered as follows," and it then set forth the terms of the Razinamah according to which the plaintiff was to pay Rs. 2,750 to the defendants. The defendants now apply to recover this amount by execution of the said decree. Various objections are raised by the plaintiff in Second Appeal." It is first contended that there is no decree at all and even if there is one it is only a declaratory decree which cannot be executed. It is argued, that according to the Civil Procedure Code, the Court was bound to pass a decree in accordance with the Razinamah only with reference to the subject matter of the suit, that there is nothing in the so-called decree to show how much of the Razinamah referred to the subject matter, that the suit itself was for the declaration that the will was a forgery and that

Ratnasawmi Chetty v. Ratnammal.

not only is there nothing in the Razinamah itself to show whether the will was accepted to be genuine or declared to be a forgery, but the Razinamah suggests that the parties did not consider it necessary to settle that dispute. All this may be conceded. Nevertheless, we are of opinion reading the decree as a whole, that it embodied all the terms of the Razinamah which were to be enforced, if necessary in execution. We therefore disallow this contention.

It is next argued that the decree was passed without jurisdiction, because it went beyond the terms of section 375 of the old Civil Procedure Code, 1882 according to which the decree should be confined to the subject matter of the suit, and also because the decree directed the payment of a sum of Rs. 2,750-0-0; which is beyond the pecuniary jurisdiction of the Dt. Munsif's Court. There is nothing to show that the decree was passed without jurisdiction. Secondly, if it was passed without jurisdiction on the ground stated, the objection cannot be taken in execution proceedings. As we have already pointed out, the decree does not state whether the Razinamah was adopted in its entirety as referring to the subject matter of the litigation. It is probable that the plaintiff abandoned his claim for a declaration of the forgery of the will in consideration of the reliefs which were awarded to him. In that case it is difficult to say that it is not competent to the Court to embody in the decree those terms in the Razinamah which formed a consideration for the withdrawal of the plaintiff's claim. See Appeal against order No. 230 of 1911 on the file of the High Court. But whether it is so or not it is quite clear the question whether a decree is against the provisions of section 375 of the old Civil Procedure Code, 1882, and is therefore erroneous, must be raised by way of appeal, and not in execution proceedings. See *The Manager of Sri Minatchi Devastanam, Madura* v. *Abdul Kasim Sahib* [1]. We agree with that decision.

As to the question whether the decree was passed without jurisdiction on the ground that the Dt. Munsif ordered payment of the sum of Rs. 2,750 it may be pointed out that the question of jurisdiction is determined not by the relief awarded but by the valuation of the suit in accordance with the terms of the plaintiff,

1. (1907) I. L. R. 30 M. 421.

Ratnasawmi Chetty v. Ratnammal.

see *Arogya Udayan* v. *Appachi Rowthan* [1] *Madho Das* v. *Ramji Patak* [2] and *Rameswar Mahton* v. *Dilu Mahton* [3]. Even if the decree was passed without jurisdiction the question cannot be raised in execution proceedings as the objection does not relate to the execution of the decree but affects its *substance* and validity. See *Sudindra* v. *Budan* [4]. This view is also taken by the Bombay High Court in *Chintaman Vithoba* v. *Bajaji* [5]. The decisions in *Lakshmanaswami Naidu* v. *Rangamma* [6] and *Raja of Vizianagaram* v. *Dantivada Chelliah* [7] do not apply. The cases relied upon by the appellant's pleader *Muhammad Sulaiman Khan* v. *Fatima* [8] *Haji Musa Haji Ahmed* v. *Purmanand Nursey* [9] *Indad Ali* v. *Jagan Lal* [10] are not in point. The decision in *Haji Musa Haji Ahmed* v. *Purmanand Nursey* [9] had reference to the validity of foreign judgments. In *Muhammad Sulaiman Khan* v. *Fatima* [8] the question for decision was whether it was the original decree of the appellate Court or the decree as amended without jurisdiction by the original court was the decree which ought to be executed. In the case in *Imdad Ali* v. *Jagan Lal* [10] the defendant died before passing of the decree and therefore he was not a party to it. In the case in *Bhagwantappa* v. *Vishwanath*[11] the decision was that according to the Ss. 224 and 225 of the old Civil Procedure Code of 1882 the Court to which a decree is sent for execution was competent to decide whether the decree was passed with jurisdiction or not and that it was only after a decision in the affirmative that it becomes an executing Court. That is not a decision therefore that the question can be raised in execution proceedings. We therefore disallow this contention also. The next question that is argued before us is that the direction to pay enhanced interest in the decree is a penalty and should not be enforced. We see no reason to think that the term is sc unreasonable that it should not be enforced.

We therefore dismiss the appeal with costs.

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1. (1901) I. L. R. 25 M. 513.
2. (1894) I. L. R. 16 A. 286
3. (1894) I. L. R. 21 C. 550.
4. (1885) I. L. R. 9 M. 80.
5. (1896) I. L. R. 22 B. 475.
6. (1902) I. L. R. 26 M. 31.
7. (1904) I. L. R. 28 M. 84.
8. (1889) I. L. R. 11 A. 314.
9. (1890) I. L. R. 15 B. 217.
10. (1895) I. L. R. 17 Al. 478.
11. (1904) I. L. R. 28 B. 378.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Ayling and Mr. Justice Tyabji.

Mamubeari—*Accused in* Cal. C. No. 403 of 1913 on the file of the Stationary Sub-Magistrate of Mangalore.

Mamubeari *In re.*

Ayling, J.

Workmen's Breach of Contract Act (Madras Act XIII of 1859)—Contract to convey clay personally and with the assistance of another—Personal labour,

Conveying clay would be "work" within the meaning of Act XIII of 1859 provided personal labour of the person undertaking the conveyance is intended to be utilized. The mere fact that another man is also to work with him does not exclude his undertaking from the scope of the Act.

Held accordingly, where the accused agreed to convey clay for the complainant in boats to be provided by the latter by his own personal labour and that of another to be provided free of charge by him, that the agreement came within the Act.

Case referred for the orders of the High Court under S. 438 of the Crl. P. C. by the District Magistrate of South Canara in his letter, dated 24th February 1914, Dis. No. 222 D. M. 14.

The Acting Public Prosecutor on behalf of the Crown.

The Court made the following

Order:—*Ayling J.* The question whether an advance was received in cash as recited in the karar is purely one of appreciation of evidence and is not a point on which this court is accustomed to interfere in revision.

The District Magistrate solicits a ruling as to whether a contract to convey clay can be regarded as falling within the scope of Act XIII of 1859. It is difficult to see why the conveyance of clay should not be "work" within the meaning of the Act—provided that the personal labour of the person who undertakes the conveyance is to be utilised. *Vide* the judgment of *Turner C. J.* in *Gilby* v. *Subbu* [1] which clearly lays down the distinction to be drawn between a workman or labourer under the Act and a mere non-working contractor.

In the present case the defendant undertook to convey clay for the complainant in his (complainant's) boat by means of his own (defendant's) labour and that of another man who was to be provided free of charge by him (defendant). He was to convey nine boxfuls a day and to receive wages at the rate of 12 as. a

Cr. Rev. C. 167 of 1914. 10th August 1914.

1. (1883) I. L. R. 7 M. 100.

Mamubeari
In re.

Ayling, J.

day. I consider that this agreement comes within the scope of the Act. The mere fact that another man was also to work does not exclude it : *vide* the wording of S. 1 of the Act and the ruling above quoted.

The case reported in *Caluram* v. *Chengappa* [1], to which the District Magistrate refers is easily distinguishable. There the contract was to convey salt by boat; but the defendant did not bind himself to render personal labour but to convey the salt in his (defendant's) own boat. As the learned Judges say "it was an agreement for the carriage of salt; but we do not think complainant can be termed an employer of labour or defendant, a labourer."

There is in my opinion no ground for interference.

Tyabji, J.—The District Magistrate of South Canara under S. 438 of the Crl. P. C. has reported for our orders certain proceedings in which the accused was ordered under the Workman's Breach of Contract Act XIII of 1859, to work in accordance with the contract between him and the complainant (Ex. A). The District Magistrate is not satisfied as to the correctness of the order.

Four requirements are necessary for making the Act applicable, *viz.*:—

1. That a contract has been entered into between

(*a*) A master or employer (the preamble mentions manufacturers, tradesmen and others) but S. 1 refers to "a master or employer" who in the subsequent sections is referred to as "the complainant" and,

(*b*) an artificer, workman or labourer.

2. That the artificer, workman or labourer has received from the master or employer or some one acting on his behalf an advance of money for the work.

3. That the advance is on account of any work which the artificer, workman or labourer has

(*a*) contracted to perform or

(*b*) to get performed by any other artificers, or workmen or labourers; and

4. That the artificer, workman or labourer has wilfully and without lawful or reasonable excuse neglected or refused to perform the work or get it performed according to the terms of

1. (1889) I. L. R. 13 M. 357.

Mamubeari *In re.*

Tyabji, J.

the contract. (In the preamble this is referred to as fraudulent breach of contract for which the remedy by suit in Civil Courts for the recovery of damages is wholly insufficient and which, it is just and proper, should be subject to punishment).

The District Magistrate refers in the first place to the evidence on which it has been held that the accused was paid the sum of Rs. 47-4-0 by the complainant under the contract. The District Magistrate expresses the opinion that "the defence story that no money was received by accused is credible." If so, then the second requirement mentioned above would not be satisfied. There was however evidence on which the Magistrate who tried the case and heard and saw the witnesses was justified in holding that the accused received the advance and I agree with my learned brother that this is not a case in which we can interfere in revision with this finding of fact.

Secondly the District Magistrate "solicits a ruling on the point whether a contract to convey clay can be regarded as falling within the scope of the Act."

It seems to me that this question is too general to permit of its being answered satisfactorily as it stands. Some contracts to convey clay would fall within the scope of the Act; others would not. Whether any particular contract would or would not fall within the scope of the Act must depend upon whether the contract fulfils the requirements of the Act as above stated.

There are two rulings of this Court to which I must refer, in this connection. In *Gilby* v. *Subbu*[1] the accused was described as a contractor by the complainant himself. The contract was for "earthwork, the cutting of a race-course; there was a plan and estimate." The accused was not to labour on the race-course. It was held that "he was not a workman within the meaning of the Act with reference to the contract for earthwork." In *Caluram* v. *Chengappa* [2] the contract was for conveyance of salt; the accused was not to render personal labour. It was held that on the one hand the complainant was not a master or employer, and on the other hand the accused was not a labourer.

These two cases illustrate the difficulty that may arise in giving full effect to both the requirements of the Act which are numbered (1) and (3) by me. For, though the contracting party

1. (1883) I. L. R. 7 M. 100. 2. (1889) I. L. R. 357.

Mamubeari. *In re* — Tyabji J.

must be an artificer, workman or labourer under (1) his contract may be to get the work performed by other artificers, workmen and labourers under (3). The decisions establish that (by reason of the first requirement) it is necessary that the work which the accused has agreed actually to do for his employer should be work of such a nature that one doing it may be described as an artificer workman or labourer, notwithstanding that under Ss. 1 and 2 that work may consist of getting something performed by other artificers workmen or labourers. When the work agreed to be done consists of providing labour and supervising the cutting of a race-course or the conveyance of salt in boats without labouring in the race-course or in the boats, then such work has been held not to be that of an artificer, workman or labourer.

Coming now to the contract with which we have to deal, the accused undertook to convey the clay which is referred to in the contract by the complainant's boat with the assistance of another person "at my (*i.e.*, the accused's) own expense." Nine boxfuls were to be daily conveyed in this manner and delivered at a tile factory. Twelve annas per day were to be the "wages" of the accused.

With reference to this contract, it is not denied that the complainant is a "master or employer". (See the requirements of the Act numbered (1) above.) The question that is raised however is whether the accused is "an artificer, workman or labourer," and whether the work agreed to be performed by him was such as would be performed by "an artificer, workman or labourer." (See the clauses numbered (1) and (2) above).

I agree with my learned brother's interpretation of the contract, that under it the accused was to convey the clay by his own labour assisted by the labour of another person. The work agreed to be done involved the carrying of the clay from the river side in the six villages referred to in the contract, and taking the boat down to the factory. A person doing this kind of work under the circumstances referred to in the contract, may, it seems to me, be described not inaptly as a labourer. Then does the fact that he is to get the assistance of another person to do this work, and to pay for that other's work, remove the accused from the

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1. (1889) I.L.R. 13 M. 351.

Mamubeari In re — Tyabji J.

category of a labourer? That question must be answered with reference to the particular work agreed to be done in the particular contract. A contractor supplying labour and materials and supervising the labourers but not himself labouring is not himself a labourer as held in the cases above cited; but when a person is both the supplier of labour and labourer himself it must depend upon the terms of the contract whether the character of work as a whole is or is not that of work done by a workman or labourer.

In the case before us it seems to me that the trying Magistrate was justified in holding that the accused was a workman or labourer within the meaning of the Act with reference to the contract in question. I would answer the reference accordingly.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Miller and Mr. Justice Sankaran Nair

Sellappa Koundan ... Appellant * (*Plaintiff*)

v.

Gurumoorti *alias* Kali Goundan ... Respondent
Peria Goundan (*Defendants* 2 *and* 1).

Sellappa Goundan *v.* Gurumurti.

Registration Act, S. 17—Compromise petition—Recital of release of rights in family property—Admissibility of.

A compromise petition reciting an actually effected release of the rights of a co-parcener in the family property is admissible in evidence to prove the release though not registered.

Bindesri Naik v. *Ganga Saran Sahu* (1), *Natesa Chetty* v. *Vengu Nachiar* (2), followed. *Chellamma* v. *Rama Rao* (3), referred to.

Appeal from the decree of the District Court of Trichinopoly in A. S. No. 439 of 1911 preferred against the decree of the Court of the District Munsiff of Namakal in O. S. No. 108 of 1910.

C. S. Venkatachariar for Appellant.

C. Krishnamachari for *R. Rangasami Iyengar* for Respondents.

The Court delivered the following

Judgment:—The compromise is in our opinion admissible in evidence under the decision of the Privy Council in *Bindesri Naik* v. *Ganga Saran Sahu* 1. In that case their Lordships decided that petitions by the creditor accepted as

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* A. A. O. No. 805 of 1913. 11th September 1913.

1. (1897) I. L. R. 20 A. 171. (P. C.) 2. (1909) I. L. R. 33 M. 102.

3. (1911) I. L. R. 36 M. 46.

Sellappa Goundan v. Gurumurti.

correct by the debtor and presented to the Courts would have been admissible without registration in proof of a variation of a registered contract. These documents were described by their Lordships as pleadings filed by the parties and the compromise petition in the present case occupies a corresponding position. In *Natesa Chetty* v. *Vengu Nachiar* [1], to which one of us was a party and with which we both agree, this view was taken of the decision in *Bindesri Naik* v. *Ganga Saran Sahu* [2], and we do not find that it has been expressly dissented from in *Chellamma* v. *Rama Rao* [3], though in that case the learned Judges seem to put a different interpretation on the language of the Privy Council. Taking this view, it follows that, if the compromise, properly construed, evidences an actually effected release by the 3rd defendant of his rights in the family property, it is admissible in evidence and if, as is argued, it evidences only an agreement to give a release, then also it does not require registration.

We reverse the decree of the District Judge and remand the case to him; he will receive the document Exhibit A 3 in evidence and dispose of the appeal according to law. Costs will abide the event.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sadasiva Aiyar, and Mr. Justice Tyabji.

Ranga Ramanujachariar and another ... *Plaintiffs**,
v. (*1 and 2 Defendants*).
Srinivasa Aiyangar and others ... *Respondents.*
(*Plff. and Defts.* 3 *to* 5).

Ranga Ramanujachariar v. Srinivasa Aiyangar

Landlord and tenant—Transfer of occupancy right—Liability for rent after notice to landlord—Tenancy created by contract and cases governed by Transfer of Property Act or Estates Land Act excepted.

In cases not governed by the Estates Land Act or the Transfer of Property Act provided that the tenancy is not one created by contract, the occupancy tenant, who transfers his interest ceases to be liable for rent after he gives notice to the landlord of the transfer.

Petition under S. 25 of IX of 1887, praying the High Court to revise the Decree of the Court of the District Munsif of Conjeevaram in S.C.S. No. 1487 of 1912.

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* C. R. P. No. 266 of 1913. 30th April 1914, and 22nd July 1914.

1. (1909) I. L. R. 33 M. 102.
2. (1897) I. L. R. 20 A. 171. (P. C.)
3. (1911) I. L. R. 36 M. 46.

Ranga Ramanujachariar v. Srinivasa Aiyangar

P. R. Srinivasa Aiyangar for Petitioner.

T. Arumainatham Pillai, for Respondents.

The case came on for hearing in the first instance before Mr. Justice Sadasiva Aiyar who passed the following

ORDER:—The only arguable ground in this revision petition relates to the contention that as defendants 1 and 2 had sold their occupancy rights on lands Nos. 67 and 68 to the 4th defendant in the beginning of Fasli 1321 (1-8-1911) and gave notice of that sale at once to the plaintiff, the defendants 1 and 2 are not liable for the rent of Fasli 1321.

Both sides admit that the Estates Land Act does not apply to the relations between the parties. So, S. 146 cl. (1) and S. 145 of that Act cannot govern the rights of the parties. Nor can S. 108. cl. (j) of the Transfer of Property Act apply as agricultural tenancies are outside the scope of that Act—(see, S. 117) unless the Local Government notifies to that effect.

Dr. Rash Behari Ghose in his argument as the Appellant's Advocate in *Sasi Bhushun Raha* v. *Tara Lal Singh Deo Bahadur* [1], contended that in the case of a tenant with rights of permanent occupancy the tenant is entitled to sell the holding and that "it is the common law of India that on transfer of a tenure with notice, the lessee ceases to be liable for rent." The validity of that contention was not decided upon by the Court in that case as it was unnecessary to do so. I am inclined to agree with that contention and I think that that principle of the common law of India is practically adopted in the Estates Land Act with a slight variation in favour of the landlord. If it is a correct principle to apply, the defendants 1 and 2 will be liable only for about one month's rent (between 1st July and 1st August 1911) due proportionately on lands, Nos. 67 and 68, so far as Fasli 1321 is concerned the 4th defendant, being liable for the balance of the rent due on those lands in that Fasli.

As the question of law above discussed is, however, an important one, let the case be posted before a Bench.

The petition coming for hearing again on 22nd July 1914 in accordance with the above direction, the Court delivered the following

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1. (1895) I. L. R. 22 C. 494.

Ranga Ramanujachariar v. Srinivasa Aiyangar — Sadasiva Aiyar J.

Judgment:—*Sadasiva Aiyar J*:—I have already given some reasons (while admitting the petition) for holding that an agricultural tenant owning the Kudivaram right ceases to be liable for subsequent rent after he gives notice to the landlord of the sale of his interest. The decision in *Monica Kithiria* v. *Subraya Hebbara*[1] turned upon the existence of privity of contract between the landlord and the mulgeni tenant in that case but the relationship of landlord and tenant with permanent occupancy right was not created by any contract in this case. S. 55 cl. (J) of the Transfer of Property Act also makes it clear that the vendee becomes liable for rent due on the property sold from the date of his acquisition of title by purchase. In the result the Lower Court's decree will be modified by making defendants 1 and 2 liable for only 78 Rupees of the amount decreed and three-fourths of the costs of the suit. The petitioners must pay three fourths of the respondents' costs here.

Tyabli J:—The question involved in this petition is whether the original tenant is responsible for rent on the holding, after he has transferred his holding to a third person and given notice of the transfer to the melwaramdar (landlord).

The Madras Estates Land Act does not apply in terms but the provisions of Sections 146 (2) and 147 (3) supply analogy. The other rules of statutory law that may possibly be applied are the transfer of property Act S. 55 (1) (j). S. 101 cl. (j) of the Transfer of Property Act however refers to relations arising out of contract. In the case of tenants with occupancy rights those rules do not, it seems to me, furnish a sufficiently close analogy. The law has, it may also be pointed out, always leaned in favour of allowing transfers of interests in land. This may be exemplified by the attitude of English Judges towards underleases even in cases where there are covenants not to underlet See *West* v. *Gwynne* [2]. On the whole therefore it seems to me that the rule of law which is indicated as being applicable in the present case is that an occupancy tenant is not any more liable for rent after he has transferred his holding and given notice of the transfer to his landlord.

I agree therefore in the order proposed by my learned brother.

1. (1907) I. L. R. 30 M. 410. 2. (1911) 2 Ch. 1.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sankaran Nair and Mr. Justice Spencer.

P. Alwar Chetty ... *Appellant.** (*Plaintiff.*)

v.

P. Chidambara Mudali (died) and others ... *Respondents.* (*Defendants.*)

Alwar Chetty *v.* Chidambara Mudaly.

Spencer, J.

Administrator General's Act (Act II of 1874) s. 20—Letters of administration taken—Powers under—Vesting—Probate and Administration Act, ss. 4,90, 149—Alienation by Administrator General--Court's sanction if necessary—Transfer by heir—Transfer by Administrator General with notice of—Priority of.

All the property whether immoveable or moveable belonging to the estate of a deceased Hindu dying intestate in respect of which the Administrator-General takes out letters of administration vests in him. Unlike the ordinary administrator, he may dispose of any portion of it without the sanction of the Court.

Administration cannot be treated as closed until every act necessary for its completion is done and a sale made by the Administrator-General of a portion of the estate to realise his commission takes precedence over an earlier transfer effected by the heir whether the Administrator-General has notice of such transfer or not.

On appeal from the judgment and decree of Sir Charles Arnold White, Kt., Chief Justice, dated the 5th September 1906, in O.S. No. 144 of 05 of the High Court.

C. K. Mahadeva Aiyar for the Appellant.

C. Venkatasubbaramiah, and *V. Visvanadha Sastri, Messrs. Short, and Bewes and Co.* for the Respondents.

The Court delivered the following

Judgments:—*Spencer J.*—This is an appeal from a judgment of the learned Chief Justice sitting as a single Judge on the Original Side of the High Court.

Upon the death of one Rajamanicka Mudali, the father of the 1st defendant, the Administrator-General was directed by an order of Mr. Justice Boddam upon a petition presented to him on the Original Side to take out Letters of Administration to the estate of the deceased. Accordingly, Letters of Administration which are Exhibit Y were granted to the Administrator-General on the 28th March 1899. The 1st defendant is said to have attained his majority on November 1904. On the same day he mortgaged a house belonging to the estate of his deceased father in favour of the 3rd defendant; and on the 26th April 1905 he sold the same

* O. S. A. No. 61 of 1906. 7th August 1914.

house to the plaintiff for Rs. 2500. Subsequently in July 1905 the Administrator-General at the 1st defendant's request sold this house to the 2nd defendant for Rs. 2300 in order to recover the commission due to him for the administration of the estate, and a sale deed was executed on the 1st August 1905 to that defendant. The plaintiff brought this suit for a declaration that the sale by the Administrator-General to the 2nd defendant was invalid; but this contention was found against him and the suit was dismissed. He now appeals.

The appellant's pleader, in his arguments, has raised the following questions:—(1) Was the sale by the Administrator-General after the 1st defendant attained majority and without the orders of the Court a good and valid sale? (2) Did the property vest in the Administrator-General by virtue of the Letters of Administration? and (3) Did the property vest in any other members of the family?

The last point may be briefly disposed of by pointing out that if the property passed by survivorship to any person other than 1st defendant, the plaintiff who claims to derive title from 1st defendant will be out of Court.

The answer to the first question must depend on the answer to be given to another question which is, what powers does the Administrator-General possess when dealing with the estates of Hindus administered by him under Act II of 1874?

S. 17 of this Act empowers a Court to pass such an order as Exhibit K purports to be, directing the Administrator-General to apply for Letters of Administration of the effects of any person including Hindus who die leaving assets within the local limits of the Ordinary Original Civil Jurisdiction of the High Court in the Presidency Towns. S. 18 provides that, in cases where danger is apprehended of such property being wasted before the legal successor can be ascertained, the Court may authorise the Administrator-General to collect and take possession of such property and hold it according to the orders and directions of the Court, and thereupon the Administrator-General shall be entitled to collect and take possession of such property and if necessary, to maintain a suit for the recovery thereof. This section is not a section under which Letters of Administration are granted, because it expressly refers to the contingency of Letters being afterwards granted.

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Mudaly
—
Spencer, J.

The section under which Letters of Administration are granted is S. 20, and this section contains no words to the effect that the Administrator-General must act "under the orders and directions of the Court". In the absence of any words to the contrary it may be presumed that after receiving the Letters of Administration he should exercise his ordinary powers as Administrator-General. In the case of *In the goods of Hari Das Dutt deceased*, [1] it was held by Harington J, that an Administrator-General holding an estate under S. 18 of the Administrator-General's Act pending the grant of Letters of Administration would not be in any better position than a private administrator. In *Lal Chand Ramdayal* v. *Gumtibai, Ghella Pema et al* v. *Gumtibai*, [2]", there is an observation at page 153 that an Administrator-General who has obtained a fiat for Letters of Administration would have no higher authority over, or estate in, the deceased's property than any ordinary Administrator would have over, or in, the property of a deceased Hindu whatever that authority or estate might be. The Act itself does not define the powers of the Administrator-General. But under the Charter of 1900 this High Court was invested with power to grant Letters of Administration in such manner and form as was at the time in use, or might hereafter be in use, in the Diocese of London and to do all other things whatsoever needful and necessary on that behalf. (See Morley's Digest, Vol. II, p. 619.

This leads us to the second question whether the estate vested in the Administrator-General by virtue of the grant of the Letters of Administration. The learned Chief Justice has held that it did, notwithstanding the fact that no vesting section is to be found in the Administrator-General's Act. S. 179 of the Indian Succession Act and S. 4 of the Probate and Administration Act expressly provide that the executor or administrator of a deceased person is his legal representative for all purposes and all the property of the deceased person vests in him as such. Before these sections can be applied, it must be considered whether the Administrator-General's Act is a self-contained Act, or whether it must be read subject to the provisions of either of these two Acts so far as they can be

1. (1906) 11 C. W. N. 193. 2. (1871) 8 Bom. H. C. R. 140 (P. C.)

applied to the circumstances of the particular case. By S. 2 of the Hindu Wills Act (XXI of 1870), S. 179 of the Indian Succession Act was applied to the wills of Hindus in the towns of Bombay and Madras and was again repealed by S. 154 of the Probate and Administration Act. The result of this is that, so far as the wills of Hindus are concerned S. 179 which vests the estate of a deceased Hindu in his Administrator does not apply, although certain other sections of the Indian Succession Act do apply to wills of Hindus; but the present case, being a case of intestacy, will not be governed by the Hindu Wills Act (XXI of 1870). Again, if the Administrator-General's Act has to be read subject to the provisions of the Probate and Administration Act, S. 4 which vests the property in the Administrator will apply; and also S. 90 which restricts the power of an Administrator to dispose of property by way of sale or mortgage without the previous permission of the Court must be applied. In the Succession Act there is no restriction such as is contained in S. 90 of the Probate and Administration Act, and therefore if the cases of Hindus dying intestate ought to be governed by the Succession Act, there can be no doubt that the estate of the deceased is vested in the Administrator and that he has full powers to dispose of it in such manner as may appear to him proper. With reference to the Charter which gives powers similar to those in use in the Diocese of London, it may be observed that the office of the Administrator-General in this country corresponds to that of the public trustee in England, and the power of a public Trustee when dealing with small estates of a capital value not exceeding 1,000 £ include such powers as arise from the fact that after he declares in writing signed and sealed by him that he takes over the administration of the estate excepting copyhold and stock vests in him as if it were transferred to him by a vesting order under the Trustee Act. The learned Chief Justice has observed in this connection that according to the practice of the English Court of Probate the Administrator would have power to deal with everything that is covered by the Grant without obtaining the special sanction of the Court. Although the Administrator-General's Act does not in express words, state that all the properties over which the Administrator-General has obtained Letters of Administration vest in him, S. 33 contemplates the

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fact that estates may be vested in the Administrator-General by virtue of Letters of Administration. In the absence of any words of limitation in this Act, we feel no doubt that the learned Chief Justice was right in holding that the estate of Rajamanicka Mudali vested in the Administrator-General. It has further been argued that in any case the Administrator-General had no authority to dispose of immoveables. Although in *Kadambinee Dossee* v. *Koylash Kaminee Dossee*[1], it was considered that Letters of Administration applied only to moveables, S. 23 (*a*) has been introduced subsequently by Act IX of 1881 and makes it clear that there is no distinction to be made in India between real property and personality, by declaring that Letters of Administration shall have effect over all the property and estate, moveable or immoveable of the deceased throughout the Presidency.

A further difficulty has arisen in this case owing to the provisions of S. 90 of the Probate and Administration Act having been embodied in the Letters of Administration (Ex. Y) granted to the Administrator-General and printed on the reverse of the same. It appears from enquiries that we have caused to be made that it is the practice on the Original Side to print S. 90 of the Probate and Administration Act on the last page of all Letters of Administration whenever they are granted under that act.

Whether this section, which restricts the power of the Administrator to mortage, or transfer by sale, the property of which he takes control, was added to the grant in this particular case by design or accident cannot now be ascertained. But in either case S. 149 of the Probate and Administration Act destroys the effect of this addition. This section declares that "Nothing contained in this act shall affect the rights, duties and privileges, of the Administrator-General, Bengal, Madras or Bombay." S. 52 of the Administrator-General's Act permits Administrators-General of Bombay and Madras to retain a commission of 5 per cent. upon the amount or value of the assets which they collect and distribute in the due course of administration.

The administration cannot be treated as closed until every act necessary for its completion has been done, and such was not the case here as may be seen from Ex. T dated 18-8-05. It

1. (1877) I. L. R. 2 C. 431.

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therefore appears that the Administrator-General had not, in the present case, been divested of his powers at the time when the sale to the 2nd defendant was made, and therefore that he was acting within the scope of his authority in conducting the sale. In this view of the case, the plaintiff's appeal fails and must be dismissed. The 2nd and 4th respondents costs (1 set) will be borne by the estate. Appellant will bear his own costs. The 3rd defendant who took a mortgage of the suit house from the 1st defendant supports the plaintiff in this appeal and pleads that even if the legal estate was not divested by the first sale, yet the beneficial interest has already passed to him to the knowledge of the Administrator-General and that he is entitled to retain it in spite of the second sale.

In regard to this contention we are of opinion that 3rd defendant's case must stand or fall with the decision of the question of the property being vested in the Administrator General at the time when 1st defendant entered into transactions with plaintiffs and 3rd defendant.

3rd defendant will bear his own costs of this appeal.

Sankaran Nair J:—I agree.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Seshagiri Aiyar.

Venkateswara Aiyar ... *Petitioner**
(Plaintiff)

v.

Cherasseri Madathil Ravanunni Nair ... *Plaintiff*
(Defendant)

Venkateswara Aiyar v. Cherasseri Madathil Ravanunni Nair.

C.P.C., Ss. 10,11, 151—Minor plaintiff—Next friend—Death of—Dismissal in consequence of—Nullity—Ss. 10 and 11 only bar trial, not institution—Stay of suit under S. 10 not dismissal—Proper procedure—Vexatious actions Act—Principles—Extension to India.

There is no provision of law enabling the Court to dismiss a suit on account of the death of the next friend of the minor plaintiff. An order dismissing the suit under those circumstances is a nullity and notwithstanding the order, the suit must be regarded as pending.

Neither S. 10 nor S. 11 C. P. C. precludes the institution of a fresh suit for the same relief; they only bar the trial.

*C. R. P. No. 494 of 1913, 1st September 1914.

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Seshagiri Aiyar J.

In cases coming within S. 10, the proper procedure is to stay the suit and not to dismiss it.

A party is not precluded from contending that an order is a nullity from the mere fact that he unsuccessfully applied to have it set aside.

To a certain exent, S. 151 C. P. C. introduces into this country the principles underlying the Vexatious Actions Act (59, and 60 Vict. C. 51).

Petition under S. 25 of Act IX of 1887, praying the High Court to revise the degree of the Court of the Subordinate Judge of Palghat in S. C. S. No. 2066 of 1912.

C. V. Anantakrishna Aiyar for Petitioner.

K. P. M. Menon for Respondent.

The Court delivered the following

Judgment:—O. S. No. 369 of 1905 was instituted by a next friend of the petitioner who was then a minor. Sometime after, the next friend died on the 25th October 1906 the Munsif declared that the suit abated in consequence of his death. On attaining majority, the petitioner moved in 1912 to set aside this order of abatement. The petition was dismissed on the ground that it was bound by limitation. The present suit was instituted for the same reliefs as those prayed for in O. S. No. 369 of 1905. The Subordinate Judge dismissed this suit on the ground that the order of abatement precluded the filing of a fresh suit. This petition is against that decision.

There can be no doubt that the order directing the suit to abate was illegal. There is no provision of law which enables a Court on the death of the next friend to dismiss the suit. It was the duty of the Court to see that a new friend was appointed or to allow the suit to be pending till the minor attained majority. The order of the 25th October 1906 was a nullity and can have no effect upon the rights of the plaintiff. The Subordinate Judge is therefore wrong in holding that that order precluded the filing of the present suit. Mr. Menon who appeared for the counter petitioner rightly conceded that that conclusion of the Subordinate Judge could not be, supported. But he argued that as the petitioner had chosen to apply to set aside the abatement order and as that application had been rejected, he was estopped from pleading that the original order was of no effect. I cannot agree with this contention. If the petitioner misconceived the effect of an order which it was legally of no force, he was not

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estopped from pleading subsequently that, it was not necessary for him to set aside that order.

The result of holding that the first order was a nullity and that the proceedings taken to set it aside did not affect the rights of the parties is that the Original Suit No. 369 of 1905 is still pending. Mr. Menon contended that as the suit had not legally terminated it was not open to the petitioner to file a fresh suit and that the order of the Subordinate Judge dismissing it could be sustained upon this ground. I was at first inclined to agree with this agreement. But on considering the matter more fully I have come to the conclusion that the order of the Subordinate Judge was wrong. The Code of Civil Procedure provides two remedies to a person who is being harassed for the same relief more than once. S. 10 enables the defendant to plead that the matter is *lis pendens* and that the suit should not be proceeded to trial. In other words he can claim that the relief claimed against him is *sub-judice* and that he should not be put to the necessity of defending the claim twice over. The other remedy is given by S. 11. If a matter has once before been adjudicated upon, the defendant can say that the matter is *res judicata* and that there should not be a second trial. In neither of these cases can he plead that the suit ought not to have been instituted. Both the pleas above referred to pre-suppose the existence of a suit on the file of the Court. The only provision of law in the Civil Procedure Code which bars the institution of suits is that contained in S. 12 which precludes a party from filing a suit in respect of a matter which by the rules he is debarred from enforcing by a suit. The present case is governed by S. 12. Since the case was heard Mr. Menon has drawn my attention to the decisions reported in *Meckjee Khetee* v. *Keswajee Divachand* [1] and *Balakrishna* v. *Kishna Lal*[2] and *Nemaganda* v. *Paresha* [3] which contains dictas to the effect that S. 10, (corresponding to S. 12 of the old code) does not bar the institution of suits, but only their trial. The learned counsel however argued that the change in the language of S. 10 indicated that the suit could be struck off at once. I am unable to see any substantial difference between the language of the new and old codes.

1. (1879) 4 C. L. R., 282. 2. (1889) I. L. R., 11 A. 148.
3. (1896) I. L. R., 21 B. 640.

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Seshagiri Aiyar, J.

The point which I reserved for consideration related to the wording of S. 151 of the Code of Civil Procedure. It is a new provision and has been inserted to enable courts to deal effectually attempts to abuse the process of the courts. To a certain extent it introduces into this country the principle underlying 59, and 60 Vic. C. 51 entitled the "Vexatious Actions Act." S. 1 of that Act deals with the abuse of the process of the Court, but it presupposes that the person seeking the aid of the Court is habitually and persistently instituting suits. Lord Halsbury points out in *Reichel* v. *Magrath* [1] that "it would be a scandal to the administration of Justice, if, the same question having been disposed of by one case, the litigant were to be permitted by changing the form of the proceedings to set up the same case again." Therefore in order that the litigant may be shut out from setting up the same case over again, the first case must have been disposed of. In the view I have taken, O. S. No. 369 of 1905 is still pending. If that is so, although the present suit is against the same party and for the same relief and is based upon the same cause of action, I cannot hold that it would be an abuse of the process of the Court to allow the plaintiff to carry on the present litigation until the previous one comes to a legal termination. It may be that the first suit may fail on some technical ground and if I were to direct that that suit must be struck off the file, I may be denying the plaintiff his just rights. After giving my most careful consideration to the points involved, I have come to the conclusion that the only course open to defendant is to move that the trial of the present suit be stayed under S. 10 of the Civil Procedure Code. Mr. Menon drew my attention to the fact that immediately after the death of the next friend a guardian was appointed by the District Court of the person and property of the minor. But there are no materials before me to show whether this guardian prosecuted O. S. No. 369 of 1905. If he did so and if the suit came to an end, that may be a bar to the present suit. That is a matter to be decided by the Subordinate Judge on the merits.

For these reasons I hold that the order of the Subordinate Judge dismissing the suit *in limine* cannot be upheld. I reverse his order and direct him to retake the case to his file and dispose of it according to law. The costs will abide the result.

1. (1889) 14 A C. 665.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Present:—Sir John Edward Power Wallis, Offg. Chief Justice and Mr. Justice Kumaraswami Sastri.

Sir Venkataswetha Chalapathy Ranga Rao Bahadur K. C. I. E.

Maharaja of Bobbili and others ... *Appellants** (*Plaintiffs*).

v.

W. S. Venkataramanjulu Naidu and others ... *Respondents* (*Defendants & 4th defendant's Legal Representative*).

Maharaja of Bobbili *v.* Venkataramanjulu Naidu.

Hindu Law—Joint family—Alienation by coparcener of his undivided share of family property—Alienee—Auction purchaser, right of, to mesne profits against other members—Practice.

The alienee of the undivided share of a member of a Joint Hindu family does not become a tenant in common with the other members of the family and will not be entitled to the profits of such share from the date of the alienation. *Nangayya Mudali* v. *Shanmuga Mudali* (1), *Observations in Ayyagari Venkatarammayya* v. *Ayyagari Ramayya* (2), *Chinnu Pillay* v. *Kalimuthu Pillay* (3), and *Subba Rao* v. *Ananta Narayana* (4), disapproved.

Appeal from the decree of the District Court of Chingleput in O. S. No. 3 of 1908.

This is a suit for partition and recovery of possession of one-third share of a shrotriem village with mesne profits. The case for the plaintiffs was that they together with the 6th defendant purchased the undivided one-third share of a shrotriem village at a court auction held in execution of the decree in O. S. No. 33 of 1899 on the file of the District Court of Chingleput on 12-7-1905, and the sale was confirmed on 17-8-1905. The 6th defendant afterwards conveyed his interest in the property to the plaintiffs, who obtained symbolical delivery of the one-third share in March 1907. Defendants 1 to 3 were the owners of another share while the remaining one-third share belonged to defendants 4 and 5. On 30-10-1907, the plaintiffs called upon defendants 1 to 5 to pay to them their share of the income from the date of confirmation of the sale and for effecting a division of the estate. Defendants 1 to 5 failed to do so, hence the suit. The contesting

*A. S. No. 177 of 1910. 21st July 1914.

1. (1914) 26 M. L. J., 576. 2. (1902) I. L. R., 25 M. 690, 716, 717.
3. (1910) I. L. R., 35 M. 47. s.c. 210 M.L.J. 246.
4. (1912) 23 M. L. J., 64.

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defendants contended that they were not liable for any profits. The District Court gave a decree for division of the village and for mesne profits only from the date of suit. From this decree the plaintiffs appealed and their main contention in the appeal was that the lower Court ought to have allowed mesne profits from at least the date of confirmation of sale.

P. Narayana Murthi for the appellants:—The joint status of the members of the co-parcenary in respect of the suit village becomes divided on the date of sale. See observations of Bashyam Aiyangar J: in *Aiyyagari Venkataramayya* v. *Aiyyagari Ramayya* [1]. As soon as an alienation of a share takes place the alienee becomes a tenant in common with the other members of the joint family. See *Chinnu Pillai* v. *Kalimuthu Chetti* [2], *Subba Rao* v. *Ananthanarayana Aiyar* [3]. The observations in *Nanjayya Mudali* v. *Shanmuga Mudali* [4] which are against the above decisions are wrong. The plaintiffs having become entitled to possession from the date of the confirmation of sale, they should be awarded one-third share of the profits.

T. Ranga Chariar with T. V. Muthukrishna Iyer and *B. Somayya* for the Respondents. The alienee according to the Privy Council decisions is merely entitled to an equity *i.e.*, a right to compel a partition. He is not entitled to immediate possession. See *Deen Dyal Lal* v. *Jugdeep Narain Singh* [5], *Suraj Bunsi Koer* v. *Sheo Pershad Singh* [6], *Hardei Narain Sahu* v. *Ruder Perkash Misser* [7], and *Ramakishore Kedarnath* v. *Jainarayan Ramrachpal* [8]. In *Suraj Bunsi Koer* v. *Sheo Pershad Singh* [9], the alienee in possession was dispossessed and was asked to work out his rights by means of a partition. The observations in *Nanjayya Mudali* v. *Shanmuga Mudali* [10], are sound in law. Plaintiffs not being entitled to possession until an actual partition takes place they are not entitled to any profits as their alienor would not be under ordinary circumstances, if he himself brought a suit for the same. There is no case distinctly in point except *Amrita Rao* v. *Govind* [11]

1. (1902) I.L.R. 25 M 690 (F.B.)
2. (1910) I.L.R. 35 M 47 (S.C.) 210 M.L.J. 246 (F.B.)
3. (1912) 23 M. L. J. 64.
4. (1913) 26 M. L. J. 576.
5. (1877) I. L. R. 3 C 198 (P.C.)
6. (1878) I. L R. 5 C 148 (P.C.)
7. (1883) I. L. R. 10 C 626 (P.C.)
8. (1913) 25 M. L. J. 512 (P.C.)
9. (1878) I. L. R. 5 C 148 (P.C.)
10. (1913) 26 M. L. J, 576.
11. (1913) 21 I. C. 590.

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(a decision of the Nagpur Court) and *Narayan Bin Babaji* v. *Nathaji Durgaji* [1] where it was assumed that the alienee was not entitled to any mesne profits.

The Court delivered the following

JUDGMENT :—This is an appeal by an auction purchaser of an undivided share belonging to a coparcener against the decree of the District Judge of Chingleput disallowing his claim for mesne profits in the suit filed by him for partition and delivery of the share purchased.

The appellant rests his case on two grounds. The first is that the members of the family of the coparcener whose share he purchased were divided in status and that consequently he is entitled to mesne profits and secondly that in any event he is entitled as a tenant-in-common with the other coparceners to mesne profits in respect of the share which he purchased.

As regards the first contention there is no oral evidence on record. The appellant relies on Exhibits A and B showing that the person whose share he purchased was divided in status from the other members of his family. Exhibit A is an affidavit filed by one of the members in a previous suit. The inference required to be drawn from Exhibit A is that the parties were divided in status but reading the affidavit as a whole it seems to us that the dispute was about the management of the properties. It does not appear that there was any decision in the suit in which Exhibit A was filed that the members were divided in status and we do not see how the allegation of one member in a previous suit could be taken to be conclusive in the matter. Ex. B does not help the appellant as it specifically recites that the incumbents "are undivided members and that they are entitled to the shrotriem village" and we are therefore of opinion that it has not been shown that the appellant's predecessor in title was divided in status from the other coparceners.

The real question is whether a purchaser of an undivided share is entitled to mesne profits as against the coparceners from the date of his purchase up to the date of the plaint. So far as we are aware there is no authority of any High Court in which the matter has been discussed and decided, nor has it

1. (1903) I. L. R. 28 B 201.

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ever been the practice to allow mesne profits in such cases. Such authorities as there are, seem to be the other way. In *Narayan Bin Babaji* v. *Nathaji Durgaji* [1], it was assumed that in a suit by a purchaser from an undivided coparcener for recovery of the share of his vendor mesne profits should not be granted and their Lordships reversed the decision of the District Judge awarding mesne profits in the suit.

The ground on which the appellant claims mesne profits is that the transfer to him effects a severance of the coparcenary as regards that share and makes him a tenant in common of the share which his vendor had at the date of the alienation and that the right to mesne profits is a necessary incident to the right of property in which a person is interested as tenant in common. Reference has been made to *Aiyyagari Venkata Ramayya* v. *Aiyyagari Ramayya* [2], *Chinnu Pillai* v. *Kalimuthu Chetti* and *Subba Rao* [3] v. *Ananthanarayana Ayyar* [4].

There are no doubt dicta in these cases that where a coparcener makes an alienation of the whole or portions of his share " the estate that is transferred to and vested in the alienee is not an equitable interest as understood in English law but a legal estate which has to be reduced to possession by the alienee standing in the shoes of the transferor and effecting a partition on the footing on which the family and the property both stood at the time of the transfer". This view has been dissented from in *Nanjayya Mudali* v. *Shanmuga Mudali* [5], where Justices Sankaran Nair and Bakewell held that an alienation of an undivided share by a member of a joint family does not put an end to the joint tenancy and that the alienee does not become a tenant in common with the other co-parceners but he is only entitled in equity to enforce his rights in a suit for partition.

We are inclined to the view taken in *Nanjayya Mudali* v. *Shanmuga Mudali* [5]. The right of the alienee to enforce partition does not rest on any text of the Hindu Law but on the equitable doctrine that a purchaser for value should be allowed to stand in his vendor's shoes and work out his rights by a partition and it seems to us that the doctrine need not be

1. (1903) I. L. R. 28 B 201, 2. (1902) I. L. R. 25 M 690 (F. B)
3. (1910) I. L. R. 35 M 47 (F.B.) s.c. 20 M.L.J.
4. (1912) 23 M. L. J. 64 5. (1913) 26 M. L. J. 576.

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extended beyond what is absolutely necessary to enable the vendee to work out his rights. In the suit for partition which may be filed by the alienee it may be that the property conveyed to him falls to some other co-parcener and it is difficult to see how this fact could be reconciled with the theory that by purchase he becomes entitled to a vested interest in the share of his coparcener in the property alienated as from the date of the alienation.

There are also clear authorities that the mere fact that a co-parcener makes an alienation does not put an end to the status of the co-parcenary as between himself and the other members of his family and if this be so it would be unfair that the other members of the family should be required to bear the expenses of the alienating co-parcener and the members of his family and also to set apart a portion of the income of the properties for meeting the claim of the alienee.

It is argued that the purchaser who paid consideration would be kept out of the fruits of his purchase should mesne profits be not given to him but the remedy is obviously in the purchaser's hands as it is open to him to file a suit for partition immediately after the purchase.

Viewing the case from the mere standpoint of hardship we think that the balance is in favour of the members of the joint family. The observations of the learned Judges who took part in *Ayyagiri Venkataramayya* v. *Ayyagiri Ramayya*[1], *Chinnu Pillai* v. *Kalimuthu Chetti*[2] and *Subba Rao* v. *Ananthanarayana Ayyar*[3] as regards the alienee being a tenant in common and not merely entitled to an equity are *obiter dicta* and we are of opinion that the broad proposition enunciated in those cases is not supported by any text in Hindu Law and we are not prepared to follow it. It is difficult to reconcile it with the decision of the Privy Concil in *Suraj Bunsi Koer* v. *Sivaprasad*[4] *Hardi Narayan* v. *Ruder Prakash*[5] and *Ramkishen* v. *Jayanarayan*[6]. The Privy Council has decided that the alienee in possession is liable to be ejected at the instance of the co-parceners who are not bound by the alienation. We are of opinion that the mere

1. (1902) I. L. R., 25 M 690.
2. (1910) I. L. R. 35 M 47.
3. (1912) 23 M. L. J. 64
4. (1879) I. L. R. 5 C. 148.
5. (1883) I. L. R. 10 C 626
6. (1913) I. L. R. 40 C 966.

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fact of a person purchasing a share of a coparcener in joint family properties would not entitle him to mesne profits as against such other members of the family and that the purchaser would be in a higher position than his alienor who under Hindu Law would not under ordinary circumstances be entitled to demand an account of the past profits.

The appeal fails and is dismissed with costs.

The memorandum of objections has not been argued and has been dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Miller.

Ramakrishnam Pillai ... *Petitioner** (*Defendant.*)

v.

Robert Fischer ... *Respondent* (*Plaintiff.*)

Ramakrishnam Pillai v. Robert Fishcher — Miller J.

* *Rent Recovery Act (VIII of 1865)—Landlord and Tenant—Varam patta—Duty to cultivate in due season—Utilisation of portion of nanjai holding as seed bed—Propriety of—Liability to be charged for—Burden on landlord to show the impropriety of.*

Prima facie, utilisation of a reasonable portion of a nanjai holding as *natankal* is a proper use of the land and unless the landlord can show that the land was wrongly used as such or that the ryot might and ought to have grown a crop on the same plot after removing the seedlings, he cannot charge the tenant for not cultivating it.

Petition under S. 25 of Act IX of 1887 praying the High Court to revise the decree of the Subordinate Judge's Court of Madura (East) in Small Cause Suit No. 494 of 1904.

K. Ramachandra Aiyar for Petitioner.

Hon'ble Sir *V. C. Desikachariar* for *T. Rangachariar* for Respondent.

The Court delivered the following

Judgment:—This case is similar to C. R. P. No. 253 of 1905 with the addition that there is here a question whether the utilization of a portion of the land for Nathankal, *i. e.*, for growing seedlings for subsequent transplantation is or is not a proper cultivation of the land in due season. The Subordinate Judge says the landlord is not bound to provide plots for seedlings. That may be so, but that is not the question. The question is rather whether the tenant is entitled to grow seedlings for his

* C. R. P. 254 of 1905. 12th November 1906.

own transplanting and if he does so whether he can be made to pay Varam for the Nathankal plot of land, if he is unable after transplanting the seedlings to grow on the same plot a crop to maturity.

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Miller J.

I have not been shewn any case in which the point has been decided or any evidence in the suits under consideration bearing on this question; the allegation that remission is not granted for Nathankal is beside the point.

Prima facie the utilization as seed-bed of a reasonable portion of a nanjai holding, is a proper use of the land and *prima facie* the ryot will get all he can out of his holding; it lies therefore on the Zemindar to show that the Nathankal plots were wrongly used as such or that the ryot might and ought to have grown a crop to maturity on the same plots after removing the seedlings.

In the absence of such evidence I must hold that the Zemindar has not made out a claim for damages for non-cultivation of the Nathankal plots.

The decree must be modified by reducing the amount awarded to the plaintiff accordingly.

Costs will be paid and received in proportion to success and failure in both courts.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Miller.

Seetharama Iyer ... *Petitioner** (*Defendant.*)

v.

Robert Fischer ... *Respondent* (*Plaintiff.*)

Seetharama Iyer v. Robert Fischer

Rent Recovery Act—Patta—Varam—Condition to cultivate in due season—Propriety of—Breach of—Measure of damages—Yield of the neighbouring land.

A condition in a Varam Patta obliging the tenant to cultivate the land in due season is not unreasonable and the proper measure of damages in case of failure to observe the condition is the yield of the neighbouring land.

Petition under S. 25 of Act IX of 1887 praying the High Court to raise the decree of the Subordinate Judge's Court of Madras (East) in S.C.S. No. 493 of 1914.

K. Ramachandra Aiyar, for Petitioner.

Hon'ble Sir V. C. Desikachariar for *T. Rangachariar* for Respondent.

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* C. R. P. No 253 of 1905. 12th November 1906.

Seetharama Iyer v. Robert Fischer.

Miller J.

The Court delivered the following

Judgment:—The condition, in the patta tendered which obliges the ryot to cultivate the land in due season cannot be said to be unreasonable in a varam agreement, provided of course that it is not read as insuring the rent in all seasons.

Here I am bound by the finding that the defendant might have cultivated the land had he chosen to do so.

The measure of damages applied by the Subordinate Judge the average yield of neighbouring land, is in my opinion the right, one.

The Petition is dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sankaran Nair and Mr. Justice Spencer

Thuri Kothanda Rama Reddiar ... *Appellant** (*Plaintiff*)

Thesu Reddiar *alias* Veerasami Reddiar ... *Respondent* (*Defendant.*)

Kothanda Rama Reddi v. Thesu Reddiar

Contract—Illegality—Public Policy—Hindu law—Adoption—Promise to pay money for bringing about adoption by promisee's daughter.

A promise to pay money for bringing about the adoption of the promisor by the daughter of the promisee is against public policy and therefore void.

Appeal from the decree of the District Court of Chingleput in O. S. No. 19 of 1910.

T. R. Ramachandra Aiyar, T. Narasimha Aiyangar, N. Visvanatha Aiyar for Appellant.

R. Sadagopachariar and A. Krishnasami Aiyar, for Respondent.

The Court delivered the following

Judgments :—*Sankaran Nair J:*—The plaintiff brought the suit as the assignee of a promissory note executed by the defendant in favor of one Venkatarama Reddi. The Judge has dismissed it on the ground that the consideration is illegal and the plaintiff is not a holder in due course. The plaintiff appeals.

Venkatarama Reddi's daughter Venkatalakshmi Ammal was authorised by her husband to adopt a son. The defendant is her husband's brother's son. Venkatarama Reddi was not willing that his daughter should adopt the defendant. What then happened according to him may be described in his own words. "The 1st defendant went away and came back in 10 days and asked one to intercede with Venkatalakshmi. I said I

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* A. 164 of 1911. 10th September 1914.

Kothanda Rama Reddi v. Thesu Reddiar. — Sankaran Nair, J.

would do so. He went away and came back in another 15 days. I advised Venkatalakshmi to adopt in case the defendant and his brother brought litigation. On the several occasions the 1st defendant told me he would give me the Rs. 10,000 Venkatalakshmi had agreed to give me if the adoption took place.. It is a public matter that my daughter had promised to give me Rs. 10,000. I had also told the 1st defendant. I do not know why my daughter was not willing to adopt the 1st defendant. My daughter had promised to give me Rs. 10,000 out of the income of the estate. Dasu Reddi came a third time 7 or 8 days later. I told my daughter defendant had agreed to pay me Rs. 10,000 as she had agree to and that it would be well she should adopt him. When he came the third time I told him I had arranged with my daughter and asked him to take her and complete the document." "The consideration for the suit promissory note was the adoption of the defendant. I agreed to bring about the adoption as the defendant promised to give me Rs. 10,000. If the defendant had not promised to give me Rs. 10,000 there would have been no adoptions and I should not have spoken about it to my daughter."

The promissory note was executed for the payment of this sum of Rs. 10,000. The evidence shows that the amount was agreed to be paid as a bribe to Venkatrama Reddi to bring about the adoption. The appellant's pleader argues that the defendant's evidence shews that the widow herself asked the defendant to execute the bond, as otherwise on account of her father's opposition she might be unable to carry out the adoption. This makes no difference as there is no suggestion that the payment was made for the widow's benefit. In my opinion this agreement to pay a bribe is one against public policy and cannot be enforced. The appellant's pleader argues that this case stands on the same footing as an alienation in favor of the widow and similar to the class of cases dealt with in *Ramasami Aiyar* v. *Venkatrama Aiyar* [1], and *Visalakshmi Ammal* v. *Sivaramier* [2] and he argues that the decision in *Shri Sitharam Pandit* v. *Shri Harihar Pandit* [3] in so far as it is opposed to these decisions should not be followed. Arrangements made for the benefit of an adopting widow stand

1. (1879) I. L. R. 2 M 91. 2. (1904) I. L. R. 27 M. 577=14 M.L.J. 310.
3. (1910) I. L. R. 35 B 169.

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Sankaran Nair, J.

on a very different footing. She is not bound in law to make any adoption. In the absence of any adoption she would be entitled to the possession of her husband's property during her life-time and absolutely to the usufruct thereof. Any arrangement therefore by which she retains any portions of that interest which she parts with by an act purely voluntary on her part might not be against public policy or against Hindu Law. It has also to be remembered that there are various texts of Hindu Law which place a widow's interest even higher than that of a son. See Mayne on Hindu Law paragraph 245 and 529. I am therefore of opinion that these cases have no bearing.

I am also of opinion for the reasons given by the District Judge that there was no consideration for the assignment. Venkatarama Reddi said in cross-examination that the arrangement was that the plaintiff was to get Rs. 1000, in case of success in the suit and that the balance was to be paid over to him. I am not prepared to accept his subsequent denial of his statement in re-examination. He is therefore not entitled to sue.

This appeal is dismissed with costs.

Spencer, J.:—I entirely agree. The case in *Deva Rajan Chetti* v. *Muthiraman Chetti* [1] is in point. In my opinion it was rightly decided in that case that the giving to third party pecuniary interest in a marriage taking place, or in other words, "trafficking in marriage" is opposed to public policy and is not a legal consideration for a contract. This is in agreement with the English law relating to marriage brocage contracts. Reading *Venkata Krishnayya* v. *Lakshmi Narayana* [2] and *Murugappa Chetti* v. *Nagappa Chetti* [2] I consider that no distinction can be made as between contracts to make payment in consideration of marriage and similar contracts in consideration of adoption In *Murugappa Chetti* v. *Nagappa Chetti* [3] it was held that though the adoption might be valid, the agreement for payment of money was a separate transaction and illegal. This is a transaction of a very different nature from fair and reasonable dispositions in favor of the adopting widow referred to in *Visalakshi Ammal* v. *Sivaramier* [4]

1. (1913) 24 M. L. J. 310. 2. (1909) I. L. R. 32 M 185.
3. (1905) I. L. R. 29 M 61. 4. (1904) I. L. R. 27 M. 577=14 M.L.J. 310.

PRIVY COUNCIL.

Present: Lords Moulton, Sumner and Parmoor, Sir John Edge and Mr. Ameer Ali.

On appeal from the High Court at Calcutta.

Raja Srinath Roy and others ... *Appellants**

v.

Dinabandu Sen and others ... *Respondents.*

Raja Srinath Roy v. Dinabandu Sen.

Jalkar (fishery) grant by Sovereign— Several Fishery—Tidal river—Changing of the course—Right to follow the river—property in the bed of the river—riparian owners—English and American Law—evidence of grant—Stare decisis—Application of law in other country or of different time—Regard to be had to historical, social and physical conditions.

In a suit by the plaintiffs as proprietors of a several fishery in certain tidal navigable rivers for possession of an exclusive fishery in a portion of a river channel, they were not able to produce the original grant but produced among other papers (i) an Ekjai Hustbud in respect of their Pergunnah for the year 1790 which showed that it included a Mahal julkar (ii) a Hakkikat chowhaddi bandi for the year 1795 which showed that the name of the Jalkar Mahal was the river Balwanta and Bil Baoor with specified boundaries though only part of it was now traceable (iii) Dowl Kabuliyats of 1793 and 1799 specifying the amount of dowl Jumma of the Jalkar (iv) an Isumnavisi Mouzbavari of 1821 mentioning the Jalkar of the river Balbanta as a mouza of plaintiff's pergunnah (v) a robokari of the court of the Collector of Faridpur which recognised that a Mahal Jalkar was included in the plaintiff's pergunnah and also gave the upstream and downstream limits.

Held though the evidence of a Government grant of an exclusive fishery in navigable waters ought to be conclusive and clear, in so far as such evidence could be expected to be forthcoming as to grants more than a century old, the evidence in this case was sufficient to show that the competent authority the Government of India in the right of the Crown did actually grant to the plaintiff's predecessors in title or settle with them so as in effect to grant a Jalkar right of several fishery in certain of the waters of the portion of the Ganges system in question.

Held further that under the rule of law settled by the decisions in Bengal, plaintiffs as such grantees were entitled to follow the shifting river for the enjoyment of their exclusive fishery so long as the waters form part of the river system within the upstream and down stream limits of their grant and whether the Government owns the soil subjacent to such waters as being the long established bed or the soil is still in the riparian proprietor as being the site of the river's recent encroachment.

Held also that as it was not shown that the rule established by the judicial decisions in Bengal was manifestly unjust or flagrantly inexpedient, their Lordships would not substitute for it a rule of Common Law which was framed for widely different conditions prevailing in England.

Indian, English and American rules as to waters stated and compared.

In proposing to apply the juristic rules of a distant time or country to the conditions of a particular place at the present day, regard must be had to the physical, social and historical conditions to which the rule is to be adapted.

* 16th. July 1914.

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Hori Das Mal v. *Mohamad Jaki* (1), *Ishur Chand Ram* v. *Ramchund Mokhurji* (2), *Gopeenath Roy* v. *Ramchunder* (3), *Lukhee Dasee* v. *Khatinah Beebee* (4), *Nobokishen Roy* v. *Uchchoolmund Gosain* (5), *Ramanath Thakoor* v. *Eshanchunder Banerjee* (6), *Gureeb Hossein Chowdhri* v. *Lamb* (7), *Nobinchunder Roy Chowdry* v. *Radha Peerce Debia* (8), *Gobind Chunder Shaha* v. *Khaja Abdool Gunie* (9), *Tarine Churn Sinha* v. *Watson and Co.*, (10), *Grey* v. *Anund Mohun Moitra* (11), *Jogendra Narayan Roy* v. *Craw ford* (12) *Bhaba Prasad* v. *Jagadindra Nath Kay* (13), *Mayor of Carlisle* v. *Graham* (14), *Foster* v. *Wright* (15), *In re Hull and Selley Ry, Co.*, (16), *Forbes* v. *Meer Mohamed Hossein* (17), *Prosunne Coomar Sircar* v. *Ram Coomar* (18), *Parodey* v. *Seele Kint Banerjee v. E. I. Co.*, (19), *Nogendro Chandra seGho* v. *Mahomed Esoff* (20), *Chundar Jalesh* v. *Ram Chunder Mookerjee* (21), *Mohiny Mohun Dass* v. *Khaja Ahsanullah* (22), *Collector of Maldah* v. *Syed Suduradire* (23), *Huree Hur Mookerjee* v. *Chunderchum Dutt* (24), *Collector of Rungpore* v. *Ramjadub Seni* (25), *Radha Mohun Mandal v. Neel Mudhub Mandel* (26); *Satcowri Ghosh Mondal* v. *Secretary of State for India* (27), *Mercer* v. *Denne* (28) *reviewed*.

Appeal from a Judgment and Decree of the High Court, dated March 11, 1908, reversing a Judgment and Decree of the additional Subordinate Judge of Faridpur, dated June 30, 1905.

The material facts have been sufficiently set forth in their Lordship's Judgment. The appellants alleged that the Bhubaneshwar was an integral part of the Padma which had been cut off by the gradual formation and the joining up of churs or islands in the main stream and that by the process of bifurcation the two rivers had joined, the point of juncture being the lower limit of the julkar in suit.

The Respondents (II) urged that the Padma and the Bhubaneshwar had been for many years separate and unconnected rivers and that in 1897, the stream in dispute broke through the low-lying-land between the two rivers which formed part of respondents Zemindari, making a new stream joining the Padma to the Bhubaneshwar.

1. (1885) I. L. R. 11 Cal 434.
2. (1807) 1 S. D. A. Rep 221.
3. (1808) 1 Macnaghten's Select Reports 228, s.c. 2 Sevester's Rep. 467.
4. (1813) 2 S. D. A. Rep 51.
5. (1856) 2 Sevester 465 Note.
6. (1863) 2 Sevester 463.
7. (1859) 20 S. D. A. Rep. 1857—1861.
8. (1866) 6 Suth W. R. 17.
9. (1866) 6 Suth W. R. 41.
10. (1890) I. L. R. 17 Cal 963.
11. (1864) W. R. 108.
12. (1905) I. L. R. 32 Cal 1141.
13. (1905) I. L. R. 33 Cal 15.
14. (1869) I. L. R. 4 Ex 365—368 per Kelly C. B.
15. (1878) 4 C. P. D. 438 (P.C.)
16. (1839) 5 M and W 327.
17. (1873) 12 B. L. R. 216.
18. (1878) I. L. R. 4 Cal 53.
19. (1856) 6 M. I. A. 267.
20. (1872) 10 B. L. R. 406.
21. (1871) 15 Suth W. R. 212.
22. (1872) 17 Suth W. R. 73.
23. (1869) 1 Suth W. R. 216.
24. 17 S. D. A. Rep. 641.
25. (1863) 2 Sevester, 373.
26. (1875) 24 W. R. 200.
27. (1894) I. L. R. 22 Cal 252.
28. (1904) 2 Ch. 558.

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De Gruyther K.C. & *Dunne* for the appellants contended that the appellants had established their title to the Julkar in the Padma river and the limits and area of the said Julkar rights. The Ekjai Hastbud of 1790, Hakikat Chowhaddibandi of 1795, Dowl Kabuliats of 1793 and 1799, Isumnavisi Mouzavari of 1821, and a robokari of 1861 left no doubt that they were granted Jalkar rights in the Padma. The proceedings in litigation in 1797, although between the appellants and another party fixed the limit of the Jalkar in question as did the maps and other transactions extending over a long period. The stream in dispute was a branch of the Padma falling within the limits of the Jalkar. It admittedly flowed for a considerable distance through and over the lands belonging to the appellants [*Lord Moulton.* You are following the river where it flows] If a river changes its bed the owner of Julkar rights had the right to enjoy them in the new channel. It made no difference whether the new bed of the river was on the land belonging to another person. The owner of the fishery had a right to follow the current together with the open channel all closing or closed channels abandoned by the river right up to the time when the channel became finally closed at both ends. So long as the river retained its navigable character it was subject to the rights of the public, and the fishery remained in the person who was grantee from the crown. The Jalkar rights in the river extended over a piece of water formed originally by the river, but so far dried up as to be disconnected from it, except in the rains, during and after floods. The Jalkar rights were settled with the appellants' predecessors many years ago. By virtue of the settlement they were entitled to exercise the right of fishery in the river wherever it flowed within the limits prescribed in the settlement.

Reference was made to *Forbes* v. *Meer Mahomed Hossein* [1], *Isur Chand Ram* v. *Ramchund* [2], *Gobind Chunder Shaha* v. *Khaja Abdool Gunnie* [3], *Krishnandro Roy Chowdhry* v. *Maharanee Surno Moyee* [4], *Tarini Churn Sinta* v. *Watso & Co.* [5], *Jogendro Narayan Roy* v. *Crawford* [6], *Bhaba Prasad* v. *Jagadindra Nath Rai* [7].

1. (1873) 12 Beng. L. R. 210, (P. C.).
2. (1807) 1 S. D. A. Rep. 22 : 1 Mcr. Digest P. 561.
3. (1866) 6 Suth W: R. 41.
4. (1873) 21 Suth W. R. 27.
5. (1890) I. L. R. 17 Cal, 963.
6. (1905) I. L. R. 32 Cal. 1141,
7. (1905) I. L. R, 33 Cal. 15.

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G. R. Lowndes (with Sir Robert Findlay) for the respondents contended that there had been no grant of fishery from the Government, nor was any right made out by prescription, or by adverse possession. Supposing there was a grant, it could not go beyond the zemindari. Supposing also that there was full grant and not confined to the zemindari it would not cover subsequent streams on another person's land. The doctrine of lost grant has not been applied to India. Morley's Dig. p. 11. In any case appellants have no right to follow the river over respondent's land. This is a common law principle. The origin of the right was that the Crown owned the beds of all tidal and navigable rivers.

Lord Moulton :—The Crown is ultimate owner of all land.

If exclusive right of fishery in tidal rivers was claimed, it must be proved by direct grant or by prescription. The first case decided in India said that there was no law upon fishery in India and therefore they must go to the Code of Justinian.

Lord Moulton.—Right of the public in tidal rivers overrides everything.

The proprietary right subsists in the land forming the bed of a changing river.

Lord Moulton.—Your arguments are based upon the theory of ownership in land in tidal rivers in England.

The Mayor of Carlisle v. *Graham* [1], laid down that a several fishery could not be acquired even in a tidal river if the soil belonged not to the Crown but to a subject.

Right of fishery goes with the land.

Lord Moulton.—Zemindar grants fishery to A, land on one side belongs to him and on the other to C. The river begins changing its bed, away goes fishery ?

In India if there was no definite law, as in this case, equity and justice would govern.

Lord Sumner :—If it is only judge made history of land, you cannot apply it to another.

Lord Moulton.—Fishery belongs to one and soil to another. Fishery is quite independent of the soil.

The land belonging to one was under water ; he had possession on it and other things as well as fisheries.

1. (1869) L. R. 4 Exch. 370.

Lord Moulton.—Magna Charta said you cannot make private rights in tidal waters, and threw fishery open to the public.

In so far as alluvion and diluvion were concerned English Law was to be applied as it stood in the case of non-tidal rivers. *Baban Mayacha* v. *Nagu Sharvacha* [1]. A number of English decisions had been applied to India. There is no reason why the English principles of fishery ought not to be extended to India.

Lord Moulton.—Supposing at the sea-side land is submerged do you think people could not follow their fish there ?

This case stood by itself.

Lord Moulton—He proves boundary upstream and down-stream, then there can be no doubt.

Gardner v. *Hodgson's Brewery Co.* [2] as to the Common Law was another argument in his favour.

Lord Moulton.—Enjoyment for a long time is not peculiar to the English law.

It had been asserted against the public and it was an exclusive right. Julkar was exclusive right against the public. It would be very unjust to deprive one of the use of his land without even giving him the right to fish in the water submerging it. Reference was made to *Gopeenath Roy* v. *Ramchunder Turkbunker* [3], *Luckbee Dassee* v. *Khatima Beebee* [4], *Nobkishen Roy* v. *Uchchootanund Gosain* [5], *Gureeb Hossain* v. *Lamb* [6], *Nobind Chunder Roy* v. *Radha Peeree Debia* [7], *Mayor of Carlisle* v. *Graham* [8], *Foster* v. *Wright* [9], Halsbury's Laws of England Vol, 14 tit Fishery

De Gruyther K. C. in reply

The Judgment of their Lordships was delivered by

Lord Sumner.—In this action the plaintiffs claimed, as proprietors of a several fishery in certain tidal navigable waters in Eastern Bengal, a decree, for possession of an exclusive fishery in a portion of a river channel, of which the principal defendants own both the bed and the banks. They succeeded

1. (1876) I. L. R., 2 B. 19, 32, 33.
2. (1903) A. C. 229.
3. (1808) 2 Sevester Reports 467.
4. (1813) 2 S.D.A. Rep. 51.
5. (1863) 2 Sevester 465 note.
6. (1859) 20 S.D.A. Rep. 1357.
7. (1866) 6 Suth W. R. 17.
8. (1869) L. R. 4 Ex. 365,
9. (1878) 4 C.P.D. 438.

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before the Additional Subordinate Judge of Faridpur and failed on appeal to the High Court at Calcutta. Hence this appeal to their Lordships' Board.

There is a section of the river system of the Lower Ganges, between Dacca on the left bank and Faridpur on the right, where the great stream divides and for many miles runs in two channels roughly parallel with one another. The general course is to the south-east. The northern of the two channels is much the larger, but the southern, the smaller of the two, is itself wide. Both channels are tidal and navigable.

The stream in the Gangetic delta are capricious and powerful. In the course of ages the land itself has been deposited by the river, which always carries a prodigious quantity of mud in suspension. The river comes down in flood with resistless force, and throughout its various branches is constantly eroding its banks and building them up again. It crawls or races through a shifting network of streams. Sometimes its course changes by imperceptible degrees; sometimes a broad channel will shift or a new one open in a single night. Slowly or fast it raises islands of a substantial height standing above high water level and many square miles in extent. Lands so thrown up are called "churs," and it is by chur-lands formed at some unknown though probably not remote date that the northern and southern channels in question are at present divided.

In the year 1897 a channel was broken through the defendants' chur-land in question. Though relatively small, even this stream was of considerable size; it is navigable for small craft, and is certainly within the ebb and flow of the tide. This new branch probably followed a line of depressions already existing, one end of which was actually an arm running up from the northern river.

The plaintiffs claim the exclusive fishery in this new navigable channel as falling within the upstream and downstream limits of their several fishery, and allege that the defendants are trespassers when they fish in it. The defendants justify their claim to fish in a portion of this channel as part of the rights of owners of the subjacent soil and of persons claiming under them,

That the plaintiffs are entitled to some fishery right in the river waters generally, not far distant from the site in question, never was much disputed, and was admitted by the respondents before their Lordships' Board, but they dispute its origin and its extent. They say that this branch is of origin so recent that no title by prescription or adverse possession arises as against themselves; that they are not affected by evidence of prescription against third parties; that even a several fishery, duly created in the main stream by the Government of India in the right of the Crown, would not extend to this new branch, still less would rights acquired in the main stream by prescription against other riparian proprietors be exercisable in it; that the evidence neither establishes such bounds for the alleged exclusive fishery upstream and downstream as would bring this branch between them, nor shows that in fact any julkar right was ever created by Government at all. In substance the Trial Judge found for an actual Government creation of the plaintiffs' right. as well as for the boundaries claimed by them. The High Court concluded against the plaintiffs on the question of the extent of their julkar rights without determining their origin.

The evidence of the origin of the plaintiffs' rights is documentary, and does not depend on the credibility, of witnesses. Chur Makundia is the name of the plaintiffs' pergunnah. They produced among many other documents (i) an Ekjai Hastbud in respect of it for the year 1790, which showed that it then included a Mahal Julkar; (ii) Hakikat chowhadibandi of the lands and jamas of that pergunnah for the year 1795 which showed that the name of the julkar mahal was River Balabanta and Bil Baor with specified boundaries, of which the Kole Churi of Alipur alone can be traced by name, (iii) dowl kabuliyats of 1793 and 1799, specifying the amount of the dowl-jumma of the julkar and (iv) an Issumnavisi Mouzahwari of 1821 mentioning the julkar in the River Balabanta as a mouza of pergunnah Chur Makundia. They put in (v) a robokari of the Court of the Collector of Faridpur dated 11th January 1861, by which the Government recognised that this julkar had been included as a mahal in the zamindari pergunnah Chur Makundia (formerly Touzi No. 110 in the Dacca collectorate, and now No. 4,000 in that of Faridpur), since before the decennial settlement. It named the upstream

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and downstream limits, and stated that the Balabanta river, in which it was enjoyed, was the same as that known in 1861 as the Padma that is the larger and more northerly of the two branches of the Ganges above described. The more southerly has been known for some fifty years as the Bhubaneshwar.

Some evidence, not very distinct, was given at the trial, apparently for the purpose of showing that no grant from the Government was any longer to be found among the papers belonging to the plaintiffs' zamindari, but no point seems to have been made, then or since that the proper searches had not been made. Although, on the other hand, when Government has created a separate estate of julkar at the period in question it is usual to find some entry of it in the decennial settlement papers, no evidence was forthcoming to show that julkar grants made prior to the decennial settlement or that settlements with zamindars made at the time of it must necessarily have taken the form of pottahs or some other muniments which should now be in the zamindar's possession, or be recorded in the Government archives still in existence. In practice such original grants are but rarely forthcoming now, and resort must be had to secondary evidence of them, or to the inference of a legal origin to be drawn from long user (*Garth, C. J.*, in *Hori Das Mal* v. *Mahomed Jaki* [1],) The Trial Judge was satisfied that the plaintiffs had proved a Government grant or settlement above the end of the eighteenth century. He was overruled by the High Court, not on the ground that no such grant was poved, but that it was not shown to have been a grant of a several fishery of wide extent. The High Court thought that in reality it was only appurtenant to the plaintiffs' actual pergunnah and was limited by its riverine bounds.

Their Lordships accept the rule laid down in the case of *Hori Das Mul* v. *Mahomed Jaki* [1] (following the English rule in *Fitzwalter's case* [2]. that the evidence of a Government grant of an exclusive fishery in navigable waters ought to be conclusive and clear, but they are of opinion that, in so far as such evidence can now be expected to be forthcoming as to particular grants more than a century old, the evidence in the

1. (1885) I. L. R., 11 C. 434. 2. (1686) 3 Keble 242.

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present case was sufficient to show that the competent authority —the Government of India in right of the Crown—did actually grant to the plaintiffs' predecessors in title, or settle with them so as in effect to grant, a jalkar right of several fishery in certain of the waters of the portion of the Ganges system in question.

The next point is one of metes and bounds. This depended partly on the above-named documents, partly on the records of certain litigation with the neighbouring zamindars of pergunnah Bikrampur and persons holding under them in 1816 and 1843, put in as part of the history of the fishery and of the claims made to it, partly on the testimony of living patnidars, ijaradars fishermen, and so on, and the local investigations of an amin deputed by order of the Court. The amin's reports and maps were accepted in both courts, and by both parties on the present appeal. The plaintiffs' case depended on fixing by means of the above materials, supplemented by a series of maps, from 1760 onwards, four points roughly forming a parallelogram, within which their alleged jalkar rights lay, the western or upstream boundary and the eastern or downstream boundary in each case extending from points north of the northern or larger channel, the Padma, to points south of the southern or smaller channel, the Bhubaneshwar, and the *locus in quo* of the dispute falling between them. The defendants contended, that in so far as any certain points were proved at all, the materials relied upon only showed that the fishery did not extend into any party of the Padma, but was limited by the right or southern bank of the main stream and thus excluded it. They pointed out that the Faridpur collectorate was bounded by the right bank of the Padma, the whole breadth of the main stream being in the collectorate of Dacca, and they argued that the robokari of 1861, which was the strength of the plaintiffs' case, proved at most a recognition of a fishery right, which stopped short of those waters in which it was now essential to the plaintiffs to make good their claim.

A sufficient answer is made by the plaintiffs. They obtain early evidence of the actual position of the points forming their boundaries north of the main stream from proceedings in suits decided in their favour between themselves or their predecessors in title and the owners of the Bikrampur zamindari, who claimed

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some jalkar rights in the main Padma also, and by means of such proceedings in 1797, 1816, and 1843, by means of other similar proceedings in litigation with some of the present defendants in 1894, 1896, and 1897, and also by a long succession of ijara kabuliyats and pottahs, which they put in evidence, they prove *de facto* possession, as under their jalkar rights, of the whole fishery in both streams between their upper and their lower limits. It is an intricate task to trace the various spots mentioned from map to map, because of the periodic diluviation of trees and houses, though these are the least transient of the landmarks available. Matters are also complicated by variations in the names of the rivers, Bhubaneshwar, Krishnapur, Narina, Padma, and Balabanta or Balbanta. The result, however, is sufficiently clear. Further, the decision recorded in the Robokari of 1861 was appealed to the Commissioner of the Division at Dacca, who at that date exercised appellate jurisdiction in such matters over the collectorate of Faridpur, and he affirmed the decision below. As this decision proceeded on the footing that the jalkar claimed extended over the waters of the Padma, and was a valid jalkar included in the permanent settlement, it may reasonably be inferred that the Commissioner of Dacca took note that the parties entitled to the jalkar, claimed rights within his collectorate, and finding nothing in the Dacca records to the contrary, affirmed the decision below for Dacca as well as for Faridpur.

The Trial Judge, following a long and considerable body of decisions in Bengal, held that, if the plaintiffs' rights in this stream out of which the new branch opened were once established, they would extend to the waters of the new branch as soon as it was formed, a principle which is conveniently called "the right to follow the river." It does not appear that this current of authority was challenged or doubted either before the Trial Judge or the High Court; certainly its authority was binding upon both. The Defendant's case simply was that in fact neither the plaintiffs nor their predecessors-in-title could be shown ever to have enjoyed or to have been entitled to any jalkar right except that lying within the boundaries of their zamindari and appertaining thereto. The High Court appears to have arrived at a conclusion in favour of the Defendants'

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argument mainly in consequence of the view taken of the true meaning of the judgment of 1816, and of the significance of the Thakbast map of 1862, and a marginal note upon it. It is not necessary to examine the language of the judgment of 1816 in detail, but their Lordships are unable to hold that it excluded the main or northern stream from the plaintiffs' fishery, either expressly or by implication. The language is obscure, but, as their Lordships read it, the plaintiffs' construction of it was right. The Thak map was pressed beyond its legitimate effect. It was concerned only with that portion of the fishery which fell within pergunnah Bikrampur and was inconclusive.

The question of the effect of deltaic changes in a river's course upon the exclusive right of fishing in it appears in the Indian decisions as long ago as the beginning of the last century. It was laid down in 1807 that if a river changes its bed the owner of jalkar rights in the old channel continues to enjoy them in the new one (*Ishurchand Rai* v. *Ramchund Mokhurji*, [1]. The converse case occurred in the following year.) A landowner sued the owner of jalkar rights in a tidal river for taking possession of a jheel formed on his land by the overflow of the river. The channel of the river had not altered, the jheel formed no part of it, and was only connected with it at the river's highest stage. Accordingly, it was held that the owner of the fishery, having no right over the plaintiffs' land, had no right to the fishery in waters thus formed upon his land. (*Gopeenath Roy* v. *Ramchunder Turkalunkar* [2]). This assumed some right of following the river and placed a particular limit upon it. It will be observed so far that whatever may have been the basis for the right of jalkar in the river, the right of fishing in the jheels was treated as belonging to the owner of the subjacent soil, a right which was shortly after, in 1813, held to be severable from the ownership of the soil, so that the bare grant by the landowner of the right of fishing in the jheel did not in itself convey any property in the soil (*Lukhee Dasee* v. *Khatimah Beebee*, [3]). Why the owner of jalkar right in the river has or may have an enjoyment of that right co-extensive with the waters of the river which permanently from part of it, though they have

1. (1807) S.D.A. Rep. 221 : 1 Mor. Dig. 561.
2. (1808) Macnaghten's Select Reports, 228 ; 2, Sevester's Reports, p.467 note).
3. (1813) 2 S. D. A. Rep. 51.

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changed their course, is not stated. Not improbably it rested on local custom, for the Bengal Alluvion and Diluvion Regulation (No. XI of 1825) is careful in a cognate matter to keep local custom alive. At any rate the principle was well established as early as 1808 that a right of fishery follows the river whatever course it may take, for the ground on which in *Gopeenath's* case the High Court allowed the appeal from the Court below, which had acted on this principle, is simply that in point of fact the jheel in question, though formed by the river's overflow, was no longer so connected with it as to form part of the river. This was long considered to have been the effect of these decisions. Mr. Sevester's note upon them in Vol. 2, p. 467, of his Reports is, "A general right of fishery in a river, when not "otherwise defined, is restricted to the channel of the river and "water considered to form part of it, not extending to adjacent "lakes or other pieces of water occasionally supplied by "overflowings of the river but not actually connected with the "channel of it." The rule was so applied in 1856 (*Nubkishen Roy* v. *Uchchootanund Gosain* [1], and in 1863 (*Ramanath Thakoor* v. *Eshanchunder Bonnerjee*, [2]. In the former it was held that the right of jalkar in the river was confined to the river and streams flowing into or from it, exclusive of jheels not connected with the channel but extending to water courses which though not-immediately within the great channel of the river adjoin or flow into it or are supplied therefrom; "their "right consists of the flowing stream and the adjuncts flowing "from or into it." In the latter the limitation of the river's adjuncts flowing from or into it was held not to extend to adjacent sheets of water with which the river communicates only when in flood. "We think," says the Court, "the grant of "jalkar must be construed as *prima facie* confined to the "rivers and sheets of water communicating therewith to which "the plaintiff might get access without trespassing on the land." It is true that these two decisions do not specifically deal with the case of the changed channel of a deltaic stream, but they do clearly lay down rules for defining the area of the waters in which the jalkar right is to be enjoyed, which carry it beyond the limits of actual navigability though confining it to waters

1 (1856) 2. Sevester 465 note. 2. (1863) 2 Sevester 463.

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which are adjuncts of the navigable stream. They make the right depend on the identity of the river in which it is enjoyed and do not confine it to such waters of that river as are superimposed on the very land once owned by the grantor of the right. The current of decision was not unruffled by doubts. The Court observes in 1859 in *Gureeb Hossein Chowdhree* v. *Lamb* [1] "the part of the country through which the Megna flows is "intersected with innumerable creeks into which the tide from "the main river flows. The right of fishing in these tidal creeks "belongs of right to the owner of the property into which they "flow," but this case is explained by the fact that the part of the river in question was almost if not quite an arm of the sea. An opinion was indicated in 1864, though not absolutely necessary to the decision, in *Maharanee Sibessury Dabee* v. *Lukhy Dabee* [2] that the extension of rights of fishery, in consequence of an expansion of the river in which they were enjoyed, ought to depend, as questions of alluvion would, upon the rapidity of the expansion. If sudden, it would work no change in the ownership of the submerged soil, and so cause no extension of the jalkar right; it would do both if it took place by gradual and imperceptible advances. The Court here inclined to connect the right of fishing indissolubly with the right to the soil subjacent to the waters in which the fishery right was enjoyed. In 1866 came two somewhat contradictory decisions. The Court in *Nobinchunder Roy Chowdry* v. *Radha Peeree Debia*[3] scouted as "preposterous" a claim to follow the diverted waters in which the plaintiffs had the fishery, but this was without discussion of the authorities, and the claim was alleged not against the owner of the soil over which the diverted waters flowed but against the owner of the fishery in the waters of another river into which the plaintiff's river had burst and discharged itself. In the second case, *Gobind Chunder Shaha* v. *Khaja Abdool Gunnie* [4] the plaintiff and defendant, joint owners of land and of a fishery, had made a partition of the land but not of the fishery, and the plaintiff sought to oust the defendant from fishing over the land which now belonged exclusively to him but had been overflowed by a change in the course of the waters. Sir Barnes Peacock in

1. (1859) 20 S. D. A., pp. 1357-1361.
2. (1864) 1 (Suth. W. R., 88.)
3. (1866) 6 Suth, W. R. 17.
4. (1866) 6 Suth. W. R., 41.

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dismissing the suit observes still : "the fishery existed in that "part of the river out of which the fish was taken, although by a "change in the course of the river it ran over the portion of the "land which was allotted to the plaintiff under the *butwara* "partition." Again, in 1873 (*Krishnendro Roy Chowdhry* v. *Maharanee Surno Moyee*[1] the Court somewhat reluctantly followed the rule, which it deemed to be settled, that the owner of the fishery where the river's channel has changed has "a right to follow the current," that he "may not only follow the "river to any channel which it may from time to time cut for "itself, but may continue to enjoy together with the open "channel all closing or closed channels abandoned by the river "right up to the time when the channel became finally closed "at both ends." Upon the facts of that case it is the latter part of this proposition that is directly involved in the decision. The whole question was learnedly reviewed by Mr. Lal Mohun Doss in 1891 in his Tagore Lectures on the Law of Riparian Rights, who (pages, 372, *et seq.*) while admitting a settled current of authority in India to the contrary, urges the very arguments and conclusions of the now respondents and relies on the same authorities. Nevertheless, after this discussion had brought the question again before the Courts and the profession, the High Court in a critical decision affirmed the long-standing rule. This was in 1890 in the case of *Tarini Churn Sinha* v. *Watson & Co.*[2] The questions were directly raised : "Can a right of jalkar in a "public navigable river exist apart from the right to the bed "of the river, or must it necessarily follow that right? "Do the defendants lose their vested right by a change in the river's course, though the river still is navigable and subject to public right?" This case raised the very question which has been in debate before their Lordships, for the change in the river's course was a sudden one taking place in the course of a single year and not by imperceptible or slow encroachment. The answer given by the Court was in favour of the owner of the right of fishing in the river. It purported to follow a converse decision in *Grey* v. *Anund Mohun Moitra*[3] and decided that "so long as the river retains its

1. (1873) 21 Suth. W. R. 27. 2. (1890) I. L.R. 17 C. 963.
3. (1864) W. R. 108.

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" navigable character it is subject to the rights of the public, and " the fishery remains in the person who was grantee from the " Government." In *Grey's* case a change of channel had left an old bed either dry or containing only pools disconnected with the river, and it was held that the river had abandoned, albeit part dry land and part jheels, became private property. Thenceforth it belonged to riparian owners who could claim settlement of it from Government, and the reason given is that " the right of the defendant " (the owner of the fishery), " being granted out of and part of the Government's right to the river, no longer exists when the Government's right is itself gone." Thus it will be observed that in *Tarini's* [1] case the Court conceived itself to be reducing the subject to symmetry by deciding that while on the one hand the owner of the fishery rights in the river lost them where there was permanent recession of the river, he increased them where there was permanent advance of the river. In the latter case the Court disregarded the conception of Government right to the river as being an incident of Government right to the subjacent soil, and treated the Government right and the right of its grantee in respect of the fishery as subsisting in the river wherever that river might flow, and not as subsisting in flowing water only where and so long as it flowed over soil vested in the Government. This view has since been treated as established. That the jalkar right in the river extends over a piece of water formed originally by the river, but so far dried up as to be disconnected from it, except in the rains, during and just after floods, was decided in 1905 in *Jogendra Narayan Roy* v. *Crawford* [2]. The ground of the decision is that such water is still part of the river system, and when that is so in fact the right of fishing persists in respect of it. This is the case of retrocession. So too in the case of *Bhaba Prasad* v. *Jagadindra Nath Rai* [3] in the same year the principle is thus expressed, " the jalkar rights were settled with the plaintiff's pre- " decessor many years ago. The plaintiffs by virtue of the " settlement conferred upon them are entitled to exercise the " rights of fishery in the said river wherever it flows within " the limits prescribed in the settlement itself." Both these cases purport to follow *Tarini's* case, which was a case of advance

1. (1890) I. L R. 17 C. 963. 2. (1905) I. L. R. 32 C. 1141.
3. (1905) I. L.R. 33 Cal. 15.

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of the river into a newly formed channel, and the rest of a long line of settled authorities. It must now be taken as decided in Bengal that the Government's grantee can follow the shifting river for the enjoyment of his exclusive fishery so long as the waters form part of the river system within the upstream and downstream limits of his grant, whether the Government owns the soil subjacent to such waters as being the long-established bed, or whether the soil is still in a riparian proprietor as being the site of the river's recent encroachment.

Their Lordships were strongly and ably pressed to disregard or at least to qualify, these decisions. The points made were (*a*) that in principle the right to grant a several fishery in tidal navigable waters is so essentially connected with the right to the soil and the bed of the channel, that no fishery right can exist where the grantor of the several fishery never has owned the subjacent soil, (*b*) that in any case the acquisition of fresh waters can go no further and can proceed no otherwise than the acquisition of fresh soil by alluvion, and therefore that an expansion of waters within which a jalkar right exists can only carry with it an extension of the jalkar right if it has taken place by imperceptible encroachments upon the land, and not by sudden irruption; and (*c*) that it would be grossly unjust to hold that the natural misfortune which swamps a landowner's soil by a river's encroachment should be accompanied by a legal ouster from such enjoyment as the natural disaster has left him. In extension of the last point it was argued that the disputed site in fact covered the sites of former enclosed jheels which belonged to and had been enjoyed by the defendants, and that no trespass could be committed as against the plaintiffs in any view by fishing where the defendants had formerly been accustomed and entitled to fish in waters overlying their own land. This question of fact, which seems not to have been passed upon by the Courts below, was not sufficiently made out, but even if it were, it appears to be covered by the general argument.

For these contentions reliance was placed on the *Mayor of Carlisle* v. *Graham* [1] where Kelly, C.B., says: "We are called "upon to decide the question which now arises for the first time: " Is the several fishery of a subject in a tidal river, the waters of

1. (1869) L. R. 4 Exch. 361 at pages 367—368.

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"which permanently recede from a portion of its course and flow "into and through another course, where the soil and the land "on both sides of the new channel thus formed belong to another "subject, transferred from the old to the new channel, and so a "several fishery created in and throughout such new channel, "or in some, and if any, in what part of it? In the case of "*Murphy* v. *Ryan* [1] O'Hogan, J., in delivering the judgment "of the Court, says, 'but whilst the right of fishing in fresh water "'rivers in which the soil belongs to the riparian owner is thus "'exclusive, the right of fishing in the sea, its arms and estu-"'aries, and in its tidal waters, wherever it ebbs and flows, is "'held by the common law to be *publici juris* and so to belong "'to all the subjects of the Crown, the soil of the sea and its "'arms and estuaries and tidal waters being vested in the Sove-"'reign as a trustee for the public. The exclusive right of "'fishing in the one case, and the public right of fishing in the "'other, depend upon the existence of a proprietorship in the "'soil of the private river by the private owner and by the "'Sovereign in a public river respectively.' And this is the "true principle of the law touching a several fishery in a tidal "river. If therefore the right of the Crown to grant a several "fishery in a tidal river to a subject is derived from the owner-"ship of the soil, which is in the Crown by the common law, a "several fishery cannot be acquired even in a tidal river if the "soil belong not to the Crown but to a subject. And all the "authorities, ancient and modern, are uniform to the effect "that if by the irruption of the waters of a tidal river a new "channel is formed in the land of a subject, although the "right of the Crown and of the public may come into existence, "and be exercised in what has thus become a portion of a tidal "river or of an arm of the sea, the right to the soil remains in "the owner, so that if at any time thereafter the waters shall "recede and the river again change its course, leaving the new "channel dry, the soil becomes again the exclusive property of "the owner, free from all right whatsoever in the Crown or in "the public."

With this case has to be considered also *Foster* v. *Wright* [2], there the proprietor of a right of fishing in the Lune, at that

1. (1868) 2 Ir. Rep. C. L. 143 at page 149. 2. (1878) 4 C. P. D., 438.

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part neither tidal nor navigable, was held entitled to "follow his river" when the river had so far shifted its course as to flow over another's land, and the person, to whom the land which came to form its new bed had previously belonged, was held to be a trespasser when he fished in its new channel. The change of bed had been gradual, perceptible and measurable over considerable periods of time, but from week to week imperceptible. It was held that the imperceptible changes had had the effect of producing an accretion to the land of the owner of the fishery, and that "the river had never lost its identity nor its bed its "legal owner," (page 446); "he has day by day and week by "week become the owner of that which has gradually and im-"perceptibly become its present bed, and the title so gradually "and imperceptibly acquired cannot be defeated by proof that "a portion of the bed now capable of identification was "formerly land belonging to the defendant or his predecessors-"in-title." The *Mayor of Carlisle* v. *Graham* [1] was distinguished on the ground that in that case the river bed was a new bed, not formed by the gradual shifting of the old one but totally new; the old bed remaining recognisable in its old site but deserted. The Eden became a river with two beds: the Lune was at all times a river with only one though an ambulatory one. As counsel in *Foster* v. *Wright*[2] boldly argued for the right to "follow the river" in its Indian sense saying (page 440), "even a sudden and violent change in its course would not "have taken away" the plaintiff's right, and as the adoption of that *a fortiori* view would have made all consideration of gradual accretion immaterial, the decision must be regarded as one which negatives the contention of the respondents in the present case. As with the river Lune so the part of the river Eden which was in question in the *Mayor of Carlisle* v. *Graham* [1] is one which does not appear to be subject to frequent change. How the law might be if conditions similar to those of Bengal could occur in England is another matter. The above cases would have been more directly in point had the river in question been one which often and swiftly changes its course, as for instance the tidal Severn, of which Hale writes (Hargrave's Law Tracts, p. 16), "that river which is a wild unruly river, and

1. (1869) L.R. 4 Exch. 631 at pp. 637.
2. (1878) 4 C. P. D. 438.

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"many times shifts its channel, especially in that flat between "Shinberge and Aure is the common boundary between the "manors on either side, *viz.*, the *filum aquae* or middle of the "stream, and this is the custom of the manors contiguous to "that river from Gloucester down to Aure." There is in this part of the Severn an ancient several fishery, enjoyed by the Lords of Berkeley under charters of Henry I., Richard I., and John, which must be much more analogous to the jalkar in the present case than cases in the rivers Eden or Lune. A somewhat similar instance in Scotland is mentioned by Lord Abinger in *In re Hull and Selby Railway Company* [1] but the question of the right to follow the river does not appear to have arisen for decision in these cases.

It was admitted that the common law of England as such does not apply in the mofussil of Bengal, but the argument was that principles established under and for English conditions afford a sound guide to the rules which should be enforced in India. Their Lordships have given these arguments careful consideration, though they would in any case be slow to disturb decisions by which rules have been established for Bengal governing extensive and important rights such as rights of jalkar, and unless they could be shown to be manifestly unjust or flagrantly inexpedient, their Lordships would not supersede them. The Indian Courts have in many respects followed the English law of waters. Sometimes their rules are the same; sometimes only similar. Jalkar may exist not only as a right attaching to riparian ownership but also "as an "incorporeal hereditament, a right to be exercised in the "tenement of another" (*Forbes* v. *Meer Mahomed Hossein* [2] as a *profit a prendre in alieno solo* (*Lukhee Dasee* v. *Khatima Beebee* [3]). In navigable waters such rights are granted by the Government of India, or, what is equivalent to a grant, settled with the grantee under the Revenue Settlement by the Government, and are thus derived from the Crown (*Prosunno Coomar Sircar* v. *Ram Coomar Parooey* [4]). The freehold of the bed of navigable waters was deemed to be in the East India Company as representing the Crown and now is vested in the Government of India in right of the

1. (1839) 5 M. & W. 327.
2. (1873) 12 Ben. L. R., at p. 216.
3. (1813) 2 S. D. A. Rep. 51.
4. (1878) I. L. R., 4 C., 53.

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Crown. (*Doe. dem. Seeb Kristo Banerjee* v. *E. I. Co.*, [1] *Nogender Chandra Ghose* v. *Mahomed Esoff*, [2]). Where the bed thus forms part of the public domain, the public at large is *prima facie* entitled to fish. Thus the English analogy has been closely followed. Again the sudden invasion of a private owner's land by the waters of a navigable river does not divest the property in the soil. If the change in the course of the navigable river results in the water in the new course being in fact navigable (that is, capable of being traversed by a boat at all seasons, *Chunda Jaleah* v. *Ram Churn Mookerjee*, [3] *Mohiny Mohun Dass* v. *Khaja Assanullah* [4]) the flooded landowner must submit to have his land traversed by the vessels of the public in the course of navigation and cannot in right of his ownership erect works on his flooded soil to the obstruction of the navigation. None the less he remains the owner, and should the waters permanently retire, his full rights as owner revive unless lapse of time or circumstances, or both, suffice to prove an abandonment of his rights of ownership for his part.

Still, there is one step which the Indian law has never taken, far as it has gone in the adoption of English rules. Often as the opportunity for so doing has arisen, it has never been held that the capacity of the Government of India to grant to or settle with a private owner the exclusive right of fishing in tidal navigable waters is so indissolubly bound up with its ownership of the soil subjacent to those waters that, no matter how those waters may subsequently change their course, while still remaining part of the same river system within the up-stream and down-stream limits of the grant, the enjoyment of the right so granted cannot extend beyond the limits of the Government's ownership of the soil lying perpendicularly underneath them, as it may vest from time to time. It is one thing to presume the soil of the bed of a tidal navigable river to be vested in the Crown and to hold that the Government of India in right of the Crown can grant the fishery in the superincumbent waters in severalty, and quite another to hold that the several fishery when

1. (1856) 6 M. I. A. 267; S.C. 10 Moore's P. C. C., 140.
2. (1872) 10 Ben. L. R. 406 S.C. 18 Suth. W. R., 113.
3. (1871) 15 Suth. W. R., 212 : 4. (1872) 17 Suth. W. R., 73

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once thus created is for ever enjoyable only in waters that continue to flow precisely over ground which was in the Crown at the date of the grant. "Whether the actual proprietary right "in the soil of British India," says Garth, C. J., in the case of *Hari Das Mal* v. *Mahomed Jaki*[1] already cited, "is vested in "the Crown or not (a point upon which there seems "some diversity of opinion) I take it to be clear that "the Crown has the power of making settlements and "grants for the purposes of revenue of all unsettled and "unappropriated lanes, and I can see no good reason why "they should not have the same power of making settlements "of jalkar rights and of lands covered by water as of land not "covered by water. In either case the settlement is made for "the purpose of revenue and for the benefit of the public." Again, the rights of the Crown are thus stated in *The Collector " of Maldah* v. *Syed Suduroodeen*[2] :—"The right to resume land is one based on the right of the Government to a portion of the "produce of every bigah of the soil as revenue, whereas the "claim to possession of the jalkars of rivers not forming portions "of settled estates is founded upon a supposed right in Govern- "ment as trustees of the waterways of the country to possess "and to assign the exclusive possession of them to any indivi- "dual it chooses on the payment of revenue for them in the "shape of a fishery rent." (*Hurreehur Mookerjee* v. *Chundeechurn Dutt* [3], *Collector of Rungpore* v. *Ramjadub Sein* [4]. See, too, *Radha Mohun Mandal* v. *Neel Madhub Mundul* [5], and *Satcowri Ghosh Mondal* v. *Secretary of State for India,* [6] where the cases are collected and discussed.

In truth the rule which in the United Kingdom thus connects the subject's right to an exclusive fishery in tidal navigable waters with the limits of the Crown's ownership of the subjacent soil is itself the result of conditions partly historical and partly geographical which have no counterpart in Lower Bengal. In Bracton's time this rule would seem to have been unknown; at any rate he ignores it, and treats the right of fishing in rivers, as did the Roman law, as a right *publici juris*. Whether in his

1. (1885) I.L.R. 11 C. 434.
2. (1864) 1 Suth. W R. 116.
3. 17 S. D. A. Rep., 641 (*Sic*).
4. (1863) 2 Sevester, 373.
5. (1875) 24 W. R., 200.
6. (1894) I. L. R., 22 C. 252.

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time this was at common law orthodox or heterodox, or whether he supplemented the defects of our insular system by a reversion to that of Rome, need not now be considered. What is clear is that during the many years between his time and Hale's the generality of the right of river fishing, if it ever had been the doctrine of the common law, was such no longer. According to Hale (*De jure maris*, page I chap. 4; Hargrave's Law Tracts, page 11), "the right of fishing in the sea and the creeks and "arms thereof is originally lodged in the Crown as the right of "depasturing is originally lodged in the owner of the wastes "whereof he is lord, or as the right of fishing belongs to him "that is the owner of a private or inland river ...... The King is "the owner of this great waste, and as a consequent of his pro-"priety hath the primary right of fishing in the sea or creeks "or arms thereof." Be it observed that this doctrine may be called essentially insular, and that the proofs of it which Hale adduces are purely English, namely, Close Rolls, Parliament Rolls, and Rolls of the King's Bench mainly in Plantagenet times, and that he places on Bracton's Roman doctrine an interpretation, confining it to rivers which are arms of the sea, which is itself a dissent from that doctrine. The question how far a rule established in this country can be usefully applied in another, whose circumstances, historical, geographical, and social, are widely different, is well illustrated by the case of navigability, as understood in the law of the different States of the United States of America. Navigability affects both rights in the waters of a river, whether of passing or repassing or of fishing, and the rights of riparian owners, whether as entitled to make structures on their soil which affect the river's flow, or as suffering in respect of their soil quasi-servitudes of towing, anchoring, or landing in favour of the common people. The Courts of the different States, minded alike to follow the common law where they could, found themselves in the latter part of the eighteenth and the early part of the nineteenth centuries constrained by physical and geographical conditions to treat it differently. In Massachusetts, Connecticut, New Hampshire, and Vermont, where the rivers approximated in size and type to the rivers of this country, the English common law rule was followed, that tidality decided the point at which the ownership of the bed and the right to fish should be public on

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the one side and private on the other. Other States, though possibly for other reasons since they possessed rivers very different in character from those of England, namely, Virginia, Ohio, Illinois, and Indiana followed the same rule. But in Pennsylvania, North Carolina, Iowa, Missouri, Tennessee, and Alabama, this rule was disregarded, and the test adopted was that of navigability in fact, the Courts thus approximating to the practice of Western Europe (*see* Kent's Commentaries, iii. 525). The reasoning has been put pointedly in Pennsylvania. Chief Justice Tilghman says in 1810, in *Carson* v. *Blazer* [1], "the common law principle concerning rivers" (viz., that rivers, where the tide does not ebb and flow, belong to the owners of adjoining lands on either side), "even if extended to "America, would not apply to such a river as the Susquehanna, "which is a mile wide and runs several hundred miles through "a rich country, and which is navigable and is actually navigated "by large boats. If such a river had existed in England no such "law would ever have been applied to it." (*See* too, *Shrunk* v. *Schuylkill Navigation Co.*, 1826, 14 *Sergeant* v. *Rawle*, at p. 78). Thirty years later in *Zimmerman* v. *Union Canal Co.*, [2] President Porter observes, "the rules of the common law "of England in regard to the rivers and the rights of riparian "owners do not extend to this commonwealth, for the "plain reason that rules applicable to such streams as they have "in England above the flow of the tide, scarcely one of which "approximate to the size of the Swatara, would be inapplicable "to such streams as the Susquehanna, the Allegheny, the "Monongahela," and sundry other "rivers of Damascus." A similar deviation, equally grounded in good sense, from the strict pattern of the English law of waters lies at the bottom of the current of Indian cases previously referred to, and forms its justification.

In proposing to apply the juristic rules of a distant time or country to the conditions of a particular place at the present day, regard must be had to the physical, social, and historical conditions to which that rule is to be adapted. In England the rights of the Crown and other rights derived from them have long been established by authority, even though their historical

1. (1810) 2 Binney at page 477. 2. 1 Watts & Sergeant 351.

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origin is imperfectly known or conjectural. The result may be that the law is quite certain and yet is based on considerations of history and precedent which are quite the reverse. In Bengal a special history, and a special theory of rights, tenures and obligations condition the rules applicable to such an incorporeal hereditament as that now in question. In England we go back before Magna Charta for the commencement of several fisheries in tidal navigable waters, and know little of their actual origin. In Bengal it is sufficient to say that at the time of the decennial or the permanent settlement, or since, such rights, though possibly descending from remote antiquity, were settled with the Government of India, whose special position, originating on 12th August 1765, when the East India Company became receiver-general in perpetuity of the revenues of Bengal, Orissa, and Behar, is historically well known. English tenures and Bengal Zemindari rights, unduly assimilated at one time, have never fully corresponded to one another. Above all the difference, indeed the contrast, of physical conditions is capital. In England the bed of a stream is for the most part unchanging during generations, and alters, if it alters at all, gradually and by slow processes. In the deltaic area of Lower Bengal change is almost normal in the river systems, and changes occur rarely by slow degrees, and often with an almost cataclysmal suddenness. If English cases were applied to Bengal, so that the area of enjoyment of a several fishery in tidal navigable waters should be limited to the area within which the Crown, the assumed grantor of the fishery, had owned the subjacent soil at the time of its grant, who could say from time to time what the bounds of that enjoyment are, and where the ownership of the soil is to be delimited? The course of the waters has been in flux for ages: at what date is this ownership to be taken? As Lord Abinger says of the rule of gradual accretion of soil in *In re Hull and Selby Railway* [1] the theoretic basis of which has been variously stated from the time of Blackstone to the present day (*see* the different theories collected by Farewell, L. J., in *Mercer* v. *Denne* [2] "the principle is founded on the "necessity which exists for some such rule of law for the "permanent protection and adjustment of property." Take which date you will, the ever-shifting river does not run now

1. (1839) 5 M. and W. 327. 2. (1901) 2 Ch. 534 at 558.

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where it ran then, and if the ownership of the soil remains as it was, it is sheer guesswork to say in which part of the present waters the grantee of jalkar rights shall enjoy his several fishery under his grantor's title, and in which parts he must abstain, since the waters flow over the soil of private owners? Any given section of the river system is in all probability a shifting and irregular patch-work of water flowing over soil which belonged to the Soveriegn at the selected date and of water flowing over soil then belonging to other owners and since encroached upon, with the back ground of a probability that before the date in question, and yet within historic times, no water may have run there at all. By what analogy can rules applicable to the Eden and the Lune be profitably applied to such physical conditions?

It was urged that the established rule with regard to alluvion should be applied to rights of jalkar; that since the right to accretions and the liability to derelictions of soil attached only to gradual accretions or to erosions taking place by imperceptible degrees, so too the right of the owner of the fishery to "follow the river" ought to be limited to cases where the river's encroachments were gradual, and ought not to be extended to an irruption as sudden, and accomplished as rapidly, as was the formation of the channel in question in the defendants' lands. It is to be observed that here too Indian law, doubtless guided by local physical conditions, has adopted a rule varying somewhat from the rule established in this country. Where under English conditions the rule applies to "imperceptible" alterations. Regulation XI of 1825, Articles 1 and 4, speak of "gradual accession." The analogy of the English rule can hardly be prayed in aid when Indian legislation has thus an established and different rule on the same subject. Further, as the Indian rule is established now beyond question, it may perhaps be said without offence of the Indian as of the English rule, that it represents rather a compromise of convenience than an ideal of justice, for that which is a man's own does not become another's any more agreeably to ideal justice by being filched from him gradually instead of being swallowed whole. In any case the analogy is not in *pari materia*. Property in the soil is one thing; enjoyment of a profit *a prendre* in flowing

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water may in some respects be another. True, the profit *a prendre* is to be enjoyed *in alieno solo*; such is its nature. True too that at the time of the grant, the grantor has no power to create this incorporeal hereditament where his ownership of the soil does not extend; but when the power to grant arises from Sovereignty, and has never been decided to be limited to the bounds of the grantor's proprietorship as it may continue to exist from time to time, the mere fact that the jalkar right is classified in the language of the English law of real property as a *profit a prendre in alieno solo* does not prevent its proprietor from being entitled to follow the river in its natural change. The fish follows the river and the fisherman follows the fish; this may be right or wrong, but the question is not settled by asking under what circumstances of natural physical change the proprietor of an acre of dry land, which has vanished from sight, can claim to have still vested in him an equal area of river bed on the same site, or another acre of dry land transferred by the river and attached by accretions to another proprietor's land.

Lastly, it is said to be unjust that a land-owner should not only lose the use of his land when the river overflows it, but also the right to fish over his own acres and in his own waters, in order that another may unmeritoriously fish in his place. There is some begging of the question here; the waters are not his waters, nor is the change confined to the flooding of his fields. It is the river that has made his land its own; the waters are the tidal navigable waters of the great stream. In physical fact the land-owner enjoys his land by the precarious grace of the river, whose identity is so persistent, and whose character is so predominating, as almost to amount to personality; and is it fundamentally unjust that in law too he should lose what he has lost in fact, and be precluded from taking in substitution for his lost land an incorporeal right which has been granted not to him but to another? The Sovereign power lawfully invests its grantee with jalkar rights in part of river; is it unjust that when that river shifts its course, changing in locality but not in function, the owner of those rights should still enjoy them in that self-same river, instead of being despoiled of them by the course of nature, which he could neither foresee nor control? There must be some rule and there must be some hardship. To say the least there is

no such proof that one rule is better than the other as would even approach the conclusion that the rule established should now be set aside.

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Their Lordships are of opinion that no reason sufficiently cogent has been found to warrant them in disregarding the settled Indian authorities, and being further of opinion that the plaintiffs established their claim at the trial, they will humbly advice His Majesty that the appeal should be allowed with costs here and below, and that the judgment appealed from should be set aside and the judgment of the Trial Judge restored.

Solicitors for appellants ? *Watkins & Hunter.*

Solicitors for respondents : *Theodore Bell* & *Co.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Ayling and Justice Hannay.

Rajammal and another ... *Appellants* * (*Defendants*)

v.

Madhava Yogi and another ... *Respondents* (*Plaintiffs*).

Rajammal *v.* Madhava Yogi.

Vendor and purchaser—Ejectment—Pleas open to defendant—Party in possession without title—Conveyance in favour of plaintiff—Sham or nullity.

It is open to a party in possession to resist a suit in ejectment by showing that the sale in favour of the plaintiff was a mere sham and conveyed no title. *Trimbak Bhikaji* v. *Shankar Sham Rav* (1) *distinguished Mulji Govindaji* v. *Nathu Bhai* (2), followed.

Second appeal from the decree of the Court of the Subordinate Judge of Tanjore in A.S. 1024 of 1911 preferred against the decree of the Court of the District Munsif of Tiruvadi in O. S. No. 106 of 1911.

T. V. Muthukrishna Aiyar for Appellants.

C.V. Ananthakrishna Aiyar and *P. S. Vaidhyanatha Aiyar* for Respondents.

The Court delivered the following

Judgment:—Plaintiff (Respondent) sued for possession of a house which he purchased from a widow Balasundari Ammal

*S.A. 467 of 1913. 9th September 1914.

1. (1911) I.L.R. 36 B. 37.
2. (1890) I. L.R., 15 B. 1.

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(deceased before suit) by a registered sale-deed (Exhibit B). Appellants were the contesting defendants (Nos. 2 and 3). They impugned Balasundari Ammal's right to alienate the property and further contended that the sale by (Exhibit B) was a purely nominal transaction.

The District Munsif found that Balasundari Ammal had only a widow's estate in the property; and further (Ex. B.) did not evidence a real sale and plaintiff obtained no title to the property under it. He therefore dismissed the suit.

The Subordinate Judge on appeal set aside the dismissal and gave plaintiff a decree. He found (therein agreeing with the Munsif) that an adoption set up by appellant was invalid and that, they were not the reversioners to Balasundari's husband. He therefore held that it was not open to them to question the alienation (Ex. B.) and its consideration.

In so far as the transaction was attacked on the ground that it was in excess of a widow's powers of alienation, the Subordinate Judge is quite correct; but he appears to have overlooked the fact that this is not the only plea set up by the appellants and found in their favor by the District Munsif. The general principle is that a person in possession can resist a suit for ejectment against all but the true owner and whether appellants are reversioners or not it is open to them to show if they can that respondent's sale-deed is a purely nominal transaction, never intended to be given effect to and absolutely void in law.

Respondent's Vakil argues that a person in possession without title cannot question the real nature of a registered instrument relied on as title by a plaintiff in an ejectment suit and he relies on *Trimbak Bhikaji* v. *Shankar Sham Rav* [1]. We have carefully considered the judgment in that case. It contains one passage which certainly lends support to Respondent's contention but reading the judgment as a whole we doubt if the learned Judges intended their remarks to cover a case like the present. They were considering the view of the lower Appellate Court in that case, which had held that it was open to the 1st defendant therein (a mere trespasser as in the present case) to avail himself of all such grounds of attack, as

1. (1911) I. L. R. 36 B 37.

might have been raised by the plaintiff's alienor if she had sued to set aside the sale. They pointed out the fallacy of this view and in this we respectfully agree. But we are not satisfied that they intended to lay down that it was not open to the 1st defendant to show that the alienation to plaintiff was an absolute nullity; if they did, we must equally respectfully dissent. We may refer to an earlier case of the same Court *Mulji Govindji* v. *Nathu Bhai Hirachand* [1] in which Sargent C. J. and Bayley J. clearly laid that it was always open to a person sued in ejectment to show that the assignment to the plaintiff was only a sham transaction and to resist the suit on this ground. In this view we agree. We must therefore set aside the decree of the lower appellate Court and remand the appeal for rehearing and disposal in the light of the above remarks. Costs will abide the result.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Ayling and Mr. Justice Napier.

Krishna Iyer .. *Appellant* * (*Plaintiff.*)

Ramaswami Iyer and another ... *Respondents* (*Defendants.*)

Deed—Construction—Chit Fund Rules—Payment on furnishing security "to the satisfaction of the proprietors"—Discretion—Capricious or arbitrary exercise—Proof of, essential for court's interference.

Where under the rules of a chit fund, the purchaser of any instalment was to draw the money on furnishing security to the satisfaction of the proprietors of the fund.

Held that in the absence of evidence that they acted arbitrarily or capriciously in the exercise of their discretion, the court could not go behind their judgment.

Second appeal from the decree of the District Court of Trichinopoly in A. S. No. 584 of 1912 preferred against the decree of the Court of the District Munsif of Srirangam in O. S. No. 310 of 1911.

T. R. Venkatrama Sastri and *K. S. Ganesa Iyer* for Appellants.

T. V. Muthukrishna Iyer for Respondent.

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* S.A. No. 1567 of 1913. 8th September 1914.

1. (1890) I. L. R. 15 B. 1.

Krishna Iyer v. Ramasami Iyer

The Court delivered the following

Judgment.—The question raised in this second appeal is, whether the defendants, managers of a chit fund, were entitled to refuse certain security offered by the plaintiff in respect of his purchase of a second instalment. The amount for which he was liable to give security was Rs. 2,700. The lower appellate Court has valued the security at Rs. 3,000 and holding that the defendants acted as reasonable men in the position of trustees in declining to accept the security, dismissed the suit. The suit was to recover from the defendants personally interest on the chit amount at the rate of 3 per cent. per mensem. The amount itself was deposited in Court with the written statement and the security accepted as by that time the liability of the plaintiff had been decreased and the defendants were therefore then prepared to accept the security as sufficient.

In his able argument before us Mr. T. R. Venkatrama Sastri put the case as one in which under the agreement the only requisite was that the security should be satisfactory. But on our pointing out that under its terms the security had to be to the satisfaction of the agents, he endeavoured to establish that the agents were bound to accept what a Court would think a reasonable man should accept and that the lower appellate Court having applied a wrong test of sufficiency, this Court should itself decide on the propriety of the agent's action. We are not satisfied that the lower appellate Court has applied a wrong test. The Court does not say that the Trusts Act applies to the case although the learned Judge does speak of the defendants as trustees. The language used is, "applying the principle of the Trusts Act" and we are not clear that he was not entitled to do so. This appeal might therefore be dismissed on the ground that his finding on the question of the propriety of the agent's action was a finding of fact with which this Court would not interfere. We have, however, heard the case fully argued on the supposition that we could interfere; and we are satisfied that it is not for the Courts to decide what was in their opinion 'reasonable' in the circumstances, but whether there is evidence that the agents acted capriciously and unreasonably. It was argued that the agents had not an arbitrary power of rejection and that that being so, the Courts could interfere. We accept

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the first proposition, but that does not carry with it the alternative put forward.

The leading case on the point is *Braunstein* v. *Accidental Death Insurance Co.* [1]. This authority was relied upon by the appellant in support of his proposition, but in our opinion it does not help him. In that case proof of death had to be given to the satisfaction of the Directors of the Company. The plaintiff pleaded that the Directors acted capriciously in rejecting the proof offered and the defendants demurred to that plea. The Court held the demurrer was bad stating the law to be that if they unreasonably and capriciously required evidence that was not necessary to satisfy them on any reasonable view of the case that was not justified by the clause (*Vide* p. 909)

Reference is made in that case to *Dallman* v. *King* [2] which was also relied upon by the appellants. This was a case of a repairing lease containing a clause that the repairs were to be inspected and approved of by the lessor and to be done in a substantial manner. The Court held that the gist of the agreement was that the work should be done in a substantial manner and that the other words of the clause could not be read so as to impose a higher liability but should be treated as a clause enabling the lessor to ascertain whether the work had been so done. That case is therefore no authority in favour of the appellant. Accepting the authority of *Braunstein* v. *Accidental Death Insurance Co.* [1]. We hold that the true test is whether the defendants have been shown to have acted capriciously.

The appellant, as a second line of argument asked the court to return the case for a specific finding on this point urging that the District Munsiff had given a finding against the defendants. On this while the lower appellate Court said nothing about it, we are not prepared to take this course. We have no doubt that the District Munsiff's view was sought to be supported in the lower appellate Court and we must read the District Judge's finding as negativing it. Further than that, the

1. (1861) 121 E. R. 904. 2. (1837) 4 Bing. N. C. 105; S. C. 132 E. R. 729.

Krishna Iyer v. Ramasami Iyer.

finding of the District Munsif was clearly based on facts which were not alleged in the plain and have been misunderstood by the District Munsif. We agree with the lower appellate Court that it has not been shown that the defendants did not act reasonably still less did they act capriciously; and it is immaterial whether a court might have thought the security offered reasonable in the circumstances urged by the appellant. In this view the appeal must be dismissed.

On the question of costs we cannot accept the view of the lower appellate Court that the defendants should be deprived of their costs because the agreement contains unsatisfactory clauses. Such clauses are not uncommon as appears from the decisions and that is no ground for saddling the defendants, who are sought to be made personally liable, with costs.

The appeal will therefore be dismissed with defendants' costs throughout. On the memorandum of objections we are clearly of opinion that the District Judge was in error in treating the defendant's claim of part discharge to the extent of Rs. 200 as a set off. We accept his finding that the amount thus paid was Rs. 117 not Rs. 200. This amount must be deducted from the amount decreed, and the memorandum allowed with costs.

PRIVY COUNCIL.

Present:—Lords Dunedin and Moulton, Sir John Edge and Mr. Ameer Ali.

[On Appeal from the High Court of Judicature at Madras.]

Ravi Veeraraghavulu and others ... *Appellants**

v.

Sri Raja Bomma Devara Venkata Narasimha Naidu Bahadur, Zemindar Garu ... *Respondent.*

Ravi Veeraraghavulu *v.* Sri Raja Venkatanarasimha.

Madras Rent Recovery Act (VIII of 1865), Ss. 11 cl. 3 & 69—Appeal to High Court from Zilla Judge's Court—Act VIII of 1859, S. 372—Concurrent finding of fact by two lower courts binding on High Court—Civil Procedure Code (Act XIV of 1882) Ss. 584 & 585.

In a suit under S. 9 of the Rent Recovery Act by the landlord for the acceptance of an Asara Patta by his tenants, alleging that though there was an arrangement between him and his tenants in Fasli 1283, for the substitution of Veesabadi or money system for the Asara or produce sharing system, he was reserved liberty to charge wet rates if wet crops were raised on the land and that as wet crops had now been raised, he was entitled, in the absence of any agreement as to the rates leviable to revert to the Asara system, the tenant—defendants contended that the arrangement was intended to be permanent and that the landlord was not entitled under any circumstances to revert to the Asara system. Both the Collector and the District Court in appeal held that the arrangement was intended to be permanent and dismissed the suit. On a second appeal being presented to the High Court, the High Court held that the terms of the arrangement as contained in the written muchilikas gave the landlord power to charge an enhanced rate in case there was wet cultivation and as such there was no contract within the meaning of S. 11 of the Act in respect of wet crops and the landlord was entitled to revert to the Asara system in respect of them.

Held, on appeal to the Privy Council that the finding of the Collector and the District Court as to the arrangement of 1283 being permanent was one of fact and as that finding was not based merely on the construction of the muchilikas, the High Court had no power in second appeal to interfere with it.

As however the decree of the Collector dismissing the suit was wrong, their Lordships remitted the case to him to make the proper decree.

Held further, that though no provision is made in the Rent Recovery Act for appeals from the decrees of the Zilla Judge in appeal from the Collector, having regard to the general right of appeal from the decrees of the Zilla and District Courts given by S. 372 of Act VIII of 1859 and S. 584 of Act XIV of 1882, a second appeal lay to the High Court.

The judgment of the High Court in *Venkata Narasimha Nayudu* v. *Kasarane-Chinna Bapayya* (1) reversed.

Appa Row v. *Narasayya* (2), *Musammat Durga Chowdrain* v. *Jawahir Singh Chauduri* (3), *Veeraswamy* v. *Manager Pittapur Estate* (4), approved and followed.

* 18th June 1914.

1. (1908) I.L.R. 33 M. 12. 2. (1910) L.R. 37 I.A. 110.s. c. 20 M.L.J. 596.
3. (1890) L.R. 17 I A. 122. 4. (1902) I. L. R. 26 M. 518.

Ravi Veeraraghavulu v. Sri Raja Venkatanarasimha.

Consolidated appeals from a Judgment and Decree of the High Court, dated October 13, 1908, reversing the Judgment and Decrees of the District Judge of Kistna, dated March 13, 1907, which had affirmed a Judgment and Decrees of the Head Assistant Collector Bezwada Division, Kistna District, dated August 24, 1906.

The Judgment of the High Court is reported in *Venkatanarasimha Naidu* v. *Kasaranevi Chinna Bapayya* [1].

The facts of the case are sufficiently set forth in their Lordships' Judgment.

De Gruyther K. C. and *Parekh* for the appellants contended that the courts below had held that produce rents could not be demanded. The payment of cash rent fixed in perpetuity was a question of fact. The High Court had no power to enforce on the appellants produce rent. There was no right of appeal to the High Court by the Rent Recovery Act.

Lord Moulton :—We have heard all other grounds but the one which is based upon fundamental grounds.

Everything depended upon the Act of 1865. By Sec. 3 a pattah executed by the landlord and a muchilika by the tenant were necessary, to enforce which in case either party did not agree. S. 65 empowered the Collector to try the claim by summary proceedings. There might be a suit in the Civil Court for the arrears of revenue, but such Court would be bound by the provisions of S. 87 of this Act ; S. 69 expressly provided that there would be an appeal to the District Judge and was silent on there being an appeal to the High Court.

Mr. Ameer Ali :—Was this point raised in any court ?

No ; in neither court was this point taken. There was a standing oral contract deducible from two agreements.

Lord Dunedin:—How could you call it a permanent arrangement.

In view of previous agreements it must be presumed.

Mr. Ameer Ali :—You say there was an oral arrangement and was given effect to every year in writing.

1. (1909) I. L. R. 33 M. 12.

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Lord Moulton :—This is an issue of fact and we cannot deal with it.

There was express understanding with regard to subsequent years. It was difficult to shew express agreement, but there was an inference.

Mr. Ameer Ali :—When there is a pattah, the presumption is that there is no implied contract.

Reference was made to *Minakshi Naidoo* v. *Subramaniya Sastri* [1], *Rangoon Botatung & Co.* v. *Collector of Rangoon* [2] *Musammat Durga Chowdrain* v. *Javasathia Singh Chauduri* [3] and Madras Rent Recovery (VIII) Act of 1865.

Sir Erle Richards K. C. and *Kenworthy Brown* for the respondent contended that there was no contract as to the rates payable on lands cultivated with wet crops, and therefore the Court must in order to determine the rate, proceed to apply the rules contained in S. 11 and in applying them they rightly held that the pattahs tendered by the Zamindar were proper pattahs. They were in accordance with the Varam which was the established rate for dividing the crop between the landlord and the cultivator. There were many cases notably *Veeraswami* v. *Manager Pittapur Estate* [4], which decided that there lay second appeal to the High Court which had inherent jurisdiction under S. 372 of Act VIII of 1859 to hear regular appeals both on fact and law from all Subordinate Courts. The Sudder Court which existed in place of the present High Court heard appeals from the Zillah Court. Reference was made to Act VIII of 1859, S. 372 and *Veeraswamy* v. *Manager Pittapur Estate* [4].

De Gruyther K. C in reply.

The Judgment of their Lordships was delivery by

Mr. Ameer Ali :—These consolidated appeals from certain decrees of the High Court of Madras arise out of a number of suits brought by the plaintiff respondent in the Court of the Head Assistant Collector of the Bezwada Division, under the provisions of S. 9 of the Madras Rent Recovery Act (Act

1. (1887) L. R. 14 I. A. 160.
2. (1912) L. R. 39 I. A. 197.
3. (1890) L. R. 17 I. A. 122.
4. (1902) I. L. R. 26 M. 518.

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VIII of 1865). The object of all the actions was to enforce by legal process the acceptance by the defendants of the pattas or leases he had tendered to them.

The scope of the material sections of Madras Act VIII of 1865 was considered by their Lordships in *Appa Rao v. Narasayya*.[1], it is sufficient, therefore, to say in this case that under this Act the landlords are required to enter into written engagements with their tenants, in default of which no suit is maintainable to enforce the terms of the tenancy, and that in case of the refusal by the tenant to accept a patta "such as the landlord is entitled to impose," the landlord can proceed under S. 9 to enforce the acceptance by a summary suit before the Collector.

It has to be remarked that in the Madras Presidency, or certain parts thereof, irrigated lands on which are grown what are called " wet crops," are generally subject to a higher rate of rent, either in kind or in cash, than those which yield only "dry crops," and that it is usual for the zamindars to enter into yearly engagements by tendering pattas from year to year and obtaining muchilikas or counter-parts executed by the tenants evidencing the acceptance of the terms of the lease.

Shortly stated, the respondent's case as made in his plaint, is that the ryots, the defendants in the suits, prior to Fasli 1283, (approximately corresponding to 1876), paid rent for the lands in their occupation on the Asara or produce-sharing system, that in that year an arrangement was come to between them and the zamindar by which a money payment "was substituted for the " share of the produce," that this arrangement, however, was subject to the condition that whenever " the lands were fit for " wet cultivation the wet rates would be settled." And he went on to add in paragraph 3 of the plaint :—

" The lands mentioned in the tendered patta hereunto annexed having been " newly brought under wet cultivation, and on the plaintiff's officials demanding " defendant to accept the agreement as in the surrounding villages in respect of " wet crop cist; he (the defendant) having refused to do so, the Asara patta with " the rates prevailing under the immemorial system of sharing the grain heap " (Palambaram system) was tendered for the wet land cultivated by him (defen- " dant) for this year. As the defendant taking advantage of this, refused to come " to any agreement in respect of the dry land also for which there was no dispute " at all; the rates and babats in respect not only of the said wet land, but also of

1. (1910) L. R. 37, I. A., 110 ; s. c. 20 M. L. J. 596.

"the remaining dry land, were as usual entered in the said patta. All the terms of "the tendered patta so far as they are connected with the Asara system are applicable to the Asara system, and the remaining ones to the Veesabadi system."

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The ryots in their defence alleged that the arrangement introducing the Veesabadi or cash system into their villages was intended to be and was in fact permanent in character; that some years later (Fasli 1292) when the money rates were revised, the Veesabadi system was accepted as the basis of the new settlement; that recently they had been able, without any assistance or contribution from the plaintiff, to make their lands irrigable and fit for wet cultivation, and that the plaintiff was not entitled to revert to the sharing-system and thus indirectly to enhance their rents without the interposition of the Collector's Court.

On these allegations of fact the parties went to trial. The issues framed by the Head Assistant Collector are not very clearly worded, but they sufficiently indicate the main points for determination, *viz.*, whether the substitution of the Veesabadi for the Asara system in the defendant's villages was permanent in its character or, in other words, was the plaintiff zamindar entitled to revert to the sharing system on the lands being made irrigable by the tenants.

The Collector on the evidence held in substance that the conversion of the Asara rates into cash payment in 1283, which was confirmed in 1292, and had been acted upon ever since, was a permanent arrangement, and that the plaintiff was not entitled to impose on the tenants pattas on the Asara basis. He accordingly dismissed the plaintiff's suits without entering into the questions raised in the latter part of paragraph 3 of his plaint.

On appeal by the zemindar the District Judge affirmed the decrees of the Collector in respect of the finding of fact relative to the character of the arrangement of 1283, and upheld the orders dismissing the suits.

From the decrees of the District Judge the plaintiff preferred second appeals to the High Court of Madras. It is necessary to set out that portion of the High Court judgment which forms, in their Lordships' opinion, the key to the decision of the learned Judges. They say:

"Till Fasli 1283 the Asara system was in force. In Fasli 1284 money rents "were introduced and the rates of such rents were permanently fixed in "Fasli 1292. At that time all the lands were dry. Wet cultivation began

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"in Fasli 1314, and the pattahs now in dispute were then tendered, as the "tenants refused to pay more than the rates fixed in 1292 which they had previously been paying for the lands as dry. Nothing had been done by the plaintiff to "provide facilities for irrigation. In the muchilikas executed by the tenants for faslis "prior to 1314 there are clauses to the effect that the plaintiff may make an extra "charge if wet or garden crops are raised on dry lands. The amount of such extra "charge is not however stated. If the plaintiff is entitled to demand Asara rates, "the rates mentioned in the pattahs tendered are correct. The Courts below have "taken the view that the plaintiff has tendered Asara pattahs as a means of enhancing the rent and that as he has not done anything to justify an enhancement "of the rent, and has not obtained the sanction of the Collector for the enhancement, he is only entitled to the rents fixed in Fasli 1292.

"For the plaintiff it is contended that inasmuch as there is no contract as to "the rates of rent payable on lands cultivated with wet crops, he is entitled under "Cl. 3 of S. 11 of Act VIII of 1865 to claim Varam rates, it being admitted that "no money assessment has been fixed under Cl. 2 of that section.

"That there is no contract as to the rates of rent payable for wet cultivation "is clear from the admitted muchilikas, the material clauses of which have already "been referred to. The only rates fixed were for dry cultivation. The rates to be "charged for wet cultivation, were left undetermined. This being so, the contention for the plaintiff seems to be well-founded.

They accordingly set aside the orders of the District Judge, and holding that "the pattahs tendered by the plaintiff were "proper pattahs and that the defendants must accept them," they decreed the second appeals with costs in all the courts.

On an application for review of judgment, the learned Judges appear, however, to have thought that "the contract "between the parties is contained in the admitted muchilikas "and must be gathered from the construction of those "muchilikas." They therefore rejected the application for review.

The ryot-defendants have appealed to His Majesty in Council, and two points have been urged on their behalf against the validity of the judgment of the High Court.

It is contended in the first place that no appeal lay to the High Court under Section 69 of the Act which provides for one appeal only from the order of the Collector to the Zillah Judge. This contention, however, ignores the provisions of S. 372 of Act VIII of 1859, which, at the time the Madras Rent Recovery Act of 1865 was enacted, was the law regulating the procedure of the Civil Courts in India outside the Presidency towns. Under that Section a special appeal lay to the Sudder Court from all decisions passed in regular appeal by the Courts subordinate to the Sudder Court. It is not disputed that the

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Zillah Judge's Court was subordinate to the Sudder Court, not that the appeal to the Zillah Judge from the Collector's Court was a "regular appeal"—an appeal on law and facts. Later legislation substituted the High Court for the Sudder Court, and the District Judge for the Zillah Judge, but the subordination of the one to the other was maintained. The provisions of Act XIV of 1882, the law in force at the time when these suits were instituted, are clear on the point that an appeal lies from the order of the District Judge to the High Court, unless that right is taken away by express legislation or by some express provision of law.

The point that a second appeal lies to the High Court in cases arising under Act VIII of 1865, has been expressly decided in *Veeraswamy* v. *Manager Pittapur Estate*, [1] and the practice appears to have been ever since the passing of the Act for such appeals to be preferred to the High Court. Their Lordships would not be disposed to interfere with such a long-standing pratice, even if they thought there was an implied rule against second appeals lying from the decisions of the District Judge with respect to adjudications under the Act by the Collector. Their Lordships must, therefore, overrule the first objection.

In the second place, it is contended for the Appellants that the High Court was not competent under S. 584 of the Civil Procedure Code (Act XIV of 1882) to set aside a finding of fact which had been concurrently arrived at by the two inferior Courts.

Sections 584 and 585 of the Civil Procedure Code are in these terms:—

"584. Unless when otherwise provided by this Code or by any other law, "from all decrees passed in appeal by any Court subordinate to a High Court, an "appeal shall lie to the High Court on any of the following grounds, namely:—

"(a) The decision being contrary to some specified law or usage having the "force of law;

"(b) The decision having failed to determine some material issue of law or "usage having the force of law;

"(c) A substantial error or defect in the procedure as prescribed by this Code "or any other law, which may possibly have produced error or defect in "the decision of the case upon the merits."

"585. No second appeal shall lie except on the grounds mentioned in S. 584."

1. (1902) I. L. R. 26 Mad. 518.

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This distinctly prohibits second appeals on questions of fact and confines the competency of the High Court to deal with questions of law and procedure.

In the present case the sole question for determination was whether the arrangement entered into in 1283, and confirmed in 1292, was permanent. The plaintiff's allegation was that he was entitled under the circumstances to revert to the system that existed prior to 1283. The Collector and the First Appellate Court who alone were competent to deal with the facts, came to the conclusion that the arrangement was permanent. The muchilikas were only a part of the evidence on which they acted. It seems to their Lordships that the learned Judges, acting in inadvertence of S. 584 of the Code, assumed a jurisdiction which they did not possess. The rule relative to second appeals which was laid down by this Board in *Mussumat Durga Chowdrain* v. *Jawahir Singh Chaudhuri* [1], is clearly applicable to the present cases.

On the whole their Lordships are of opinion that the judgments and decrees of the High Court cannot stand. Sir Erle Richards has, however, submitted that the simple dismissal of the suits would seriously prejudice the rights of the zamindar with regard to the matters referred to in paragraph 3 of the plaint which were not dealt with by the Collector.

Their Lordships are of opinion that the best course under the circumstances would be to set aside the judgment and decrees of the High Court with a declaration that the plaintiff is not entitled to enforce the acceptance by the tenants of the pattahs tendered by him, and that the cases should be sent back to be remitted to the Collector's Court for the drawing up of proper decrees and dealing with any other questions that may be outstanding in these actions between the parties. And their Lordships will humbly advise His Majesty accordingly.

The plaintiff-respondent will pay the costs of this appeal and of the proceedings in the courts of India.

Solicitor for appellants: *E. Dalgado.*

Solicitor for respondent: *Douglas Grant.*

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1. (1890) L. R. 17 I. A. 122.

PRIVY COUNCIL.

Present:—Lords Shaw and Moulton Sir John Edge and Mr. Ameer Ali.

[On Appeal from the High Court at Calcutta.]

Maha Prasad Singh & others ... *Appellants*

v.

Ramani Mohan Singh ... *Respondent*

Surendra Mohan Singh & others ... (*Appellants*)

v.

Maha Prasad Singh & others ... *Respondents*

Ramani Mohan Singh & others ... (*Appellants*)

v.

Maha Prasad Singh & others ... *Respondents*

Maha Prasad Singh *v.* Ramani Mohan Singh.

Sonthal Parganas—Mortgage—Law relating to usury—Special legislation—Act XXXVII of 1855—*Sonthal Parganas Settlement Regulation of 1872, cl. 2, Sec. 4, 5, 6—Act VI of* 1872—*Notification by local government—Act XIV of* 1874—*Sonthal Parganas Justice Regulation Act of* 1893 *Pt. 2—Jurisdiction—Revenue Officer's Court—Suits relating to land—Interpretation—Natural signification—Protective section—Practice—Point relating to jurisdiction raised in the first court and at the Privy Council.*

A mortgage for Rs. 2,85,903,-1-9 was created on lands the bulk of which was situate in the Sonthal Parganas by the appellant mortgagors who lived there, the interest being 7½ per cent. per annum with annual rests. There was a stipulation in the bond that the mortgage might be enforced in the Bhagalpore Court. By Act XXXVII of 1855 the Sonthal Parganaus were placed under special legislation more suited to the uncivilised race of people called Sonthals. It however provided that all civil suits in which the matter in dispute shall exceed the value of Rs. 1,000 shall be tried and determined according to the General Laws and Regulations in the same manner as if that Act had not been passed. By Act VI of 1871, Bengal Civil Courts Act, certain courts were established which had jurisdiction to try matters in dispute which exceed Rs. 1,000 in value. By the Sonthal Parganas Settlement Regulation 1872, the Lieut-Governor of Bengal was given the power to invest any competent officer with the powers of any Civil Court established under Act VI of 1871 and to exclude the whole or any part from jurisdiction of the civil courts. By section 5 it provided that no land nor rent nor profits, nor interest in or arising out of any land etc. would be amenable to the jurisdiction of civil courts but could only be tried by the officer appointed under Act XXXVII of 1855 S. 2 or by the Settlement Officer under the Settlement until the settlement, was declared to be complete by a notification in the Calcutta Gazette. By S. 6 no compound interest was to be decreed, nor was the interest to be more than 25% on loans for a year, nor could interest exceed the principal of the original debt or loan. The district in which the suit lands were situate was in the course of settlement and no notification had been made declaring that the settlement was complete.

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Held that the effect of the whole course of legislation was that Civil Courts had jurisdiction in all matters exceeding Rs. 1,000 in value but that in matters pertaining to land though the value exceeded Rs. 1000, where the district was in course of settlement, the settlement officers had exclusive jurisdiction.

Held in consequence that the Bhagalpore Court had no jurisdiction to try the suit and the stipulation in the bond permitting the suit to be brought in that Court was of no avail as parties could not by consent give jurisdiction to a court which did not possess it.

Held also: that in whichever court the suit was laid, in matters pertaining to Sonthal Perganas, the rules relating to usury enacted by S. 6 of the Regulation applied.

A *proviso* and an *exception* distinguished.

Their Lordships felt bound to entertain a point of jurisdiction which had been raised in the court of the first instance and which did not depend upon any disputed facts though the point had not been pressed before the High Court.

Consolidated appeals from Judgments and Decrees from the High Court, dated April 3 and December 5, 1907 and December 18, 1908 affirming Judgments and Decrees of the Subordinate Judge of Bhagalpore, dated February 12, 1906 August 19, 1907 and August 6, 1908 respectively.

The appellants were the members of a joint Hindu family governed by the Mitakshara School of the Hindu Law residing in the Sonthal Parganas and the respondents were the representatives of one Babu Suraj Narayan who was the family pleader of the appellants and had lent them various sums of monies at different times and which were consolidated in the bond under which the suit was brought. The bulk of the property mortgaged was situated in the Sonthal Parganas and the interest agreed upon was 7½% with annual rests. The actual sum advanced was Rs. 2,85,903-1-9 but the suit was brought for the accumulated sum of Rs. 5,36,038-11-10 the remaining consisting of interest and compound interest. A suit was brought for the enforcement of the mortgage. At the very outset it was contended that the suit could not be tried at Bhagalpore in spite of the stipulation in the bond to that effect, in respect of the properties situated in the Sonthal Parganas and the High Court was unsuccessfully moved to transfer it to a Court in the Sonthal Parganas. The Subordinate Judge framed various issues of which the first was on jurisdiction. He held that the Court had jurisdiction in as much as the High Court in refusing the petition to transfer had already so held, besides there being stipulation in the bond for the suit to be tried at Bhagalpore and

certain portion of the property being situate there. He also held that Regulation III of 1872 (B. C.) Sec. 6 which checked the operation of the laws of usury in the Sonthal Parganas did not apply to a suit tried in Bhagalpore. The appellants had alleged *inter alia* that Babu Suraj Narayan Singh had abused his position as their family pleader and got the bond executed by undue influence and fraud for sums which were never paid to them. Certain litigations were fomented with the sinister notion of making money out of them and in one case he had actually thrown up a case to act as security on behalf of the opposite party and to arrange payment to the witnesses.

The Subordinate Judge decided in favour of the respondents mainly on the ground that the matter was the result of contract between the parties. On appeal to the High Court the decision of the Lower Court was upheld.

The appellant then appealed to His Majesty in Council.

Lowndes for the appellant contended that the judgment of the Lower Court was wrong inasmuch as it allowed compound interest to the mortgagees and interest in excess of the principal sum advanced.

The provisions of S. 6 of Bengal Regulation III of 1872 applied to the claim of the mortgagees so far as the Bhagalpore Court had jurisdiction to decree a sale of that part of the property which was situated in the Sonthal Parganas and to that extent and for that purpose it was a court having jurisdiction there. Under Sec. 87 of the Transfer of Property Act, 1882 and the established practice of the High Court the Subordinate Judge had no power to draw up a final decree allowing interest which had not by the preliminary decree which was silent with respect to the payment of interest after the expiration of six months and therefore must be decreed to have been impliedly refused.

The decree of the Subordinate Judge contravened the Hindu law of *damdupat.*

Reference was made to Act XXXVII of 1855, Regulation III of 1872, Regulation V of 1893, Civil Procedure Code of 1859, S. 12 and Civil Procedure Code of 1882, S. 19 respecting the previous code and to notification of Aug. 6, 1873.

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Sir Robert Finlay K. C. and *De Gruyther K. C.* for the respondents contended that the jurisdiction of the Court of the Subordinate Judge at Bhagalpore to decree interest was not affected by the Sonthal Parganas Settlement Regulation of 1872. In all cases relating to matters worth more than Rs. 1000 the ordinary law substantive and adjectve other than that contemplated by the Sonthal Parganas Regulation was to be applied. The mortgagees were entitled to bring the mortgaged properties to sale to recover the amount consisting of principal and interest, including interest subsequent to the period of grace, compound interest and costs.

They were entitled to a final decree for sale decreeing to them interest subsequent to the date of default in payment of the amount decreed. The jurisdiction of the Court was further determined by agreement between the parties.

Lord Moulton.—It fills me with suspicion as it is jurisdiction with consent.

Settlement officers become Judges in the Sonthal Parganas. The Civil Procedure Code of 1882 applied to the Sonthal Parganas.

Lord Moulton.—The general laws referred to in Sec. 2 of the Regulation, must refer to general laws in Bengal.

Reference was made to Regulation III of 1872, Sec. 5, Act XIV of 1872, Hunter's Gazetteer Vol. 22 tit. Sonthal Parganas and Bengal District, Secs. 16 and 23 of the Civil Procedure Code and Secs. 11 and 12 of the Act XXXVII of 1855 and Sec. 10 of Regulation V of 1893.

Lowndes in reply.

The Judgment of their Lordships was delivered by

Lord Moulton: In this case their Lordships have to deal with three consolidated appeals from decrees of the High Court of Judicature at Fort William in Bengal, arising out of a mortgage suit filed in the Court of the Subordinate Judge at Bhagalpur in Bengal. The first and principal appeal is from the decree of the Subordinate Judge enforcing the mortgage, which was affirmed on appeal by the High Court. Subsequently to making that decree the Subordinate Judge made two orders varying the same, both of which were on appeal set aside by the High Court,

From these two orders of the High Court appeals have been brought by the Respondents to the main appeal, and they constitute the second and third of the consolidated appeals.

The mortgage bond, to enforce which the action was originally brought was a bond for Rs. 3,50,000 dated the 21st December 1896, in favour of Babu Suraj Narayan Singh, the father of the principal Respondent, and secured on lands situated in the Sonthal Parganas and else where. The mortgagors were members of a joint Hindu family. Inasmuch as no question arises in this appeal as to the parties to the present action being the proper parties, it will be convenient to call the Appellants in the principal appeal the mortgagors and the Respondents the mortgagees.

The bond sued on was the last of a series of bonds for increasing amounts. The total of the principal amounts advanced was, according to the statements in the plaint, Rs. 2,85,903-1-9. But the total claim of the mortgagees at the date of suit was Rs. 5,36,038-11-10, the balance being made up of interest which was charged according to the provisions of the different bonds, the rate under the bond in suit being 7½ per cent. per annum with annual rests. By far the greater portion of the mortgaged properties was situated in the district of the Sonthal Parganas, and the mortgagors resided in that district. The remainder of the mortgaged property was situated within the local jurisdiction of the Bhagalpur Court.

The bond in suit was executed at Bhagalpur and contained a stipulation that the mortgagees might enforce it in the Bhagalpur Court.

The suit was commenced on June 20th, 1904. The plaint shows that it was an ordinary suit to enforce a mortgage. Written statements of defence were put in by various defendants and various issues were raised and decided by the Subordinate Judge at the trial. Most of these relate to matters no longer in dispute. The only issues that remain for their Lordships' decision in this appeal turn on the fact that the mortgagors reside and the chief part of the property is situate in the Sonthal Parganas, so that it is not necessary further to refer to the other issues.

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The judgment of the Subordinate Judge, which is dated February 12th, 1906, was in favour of the mortgagees on all issues. On the appeal to the High Court the argument seems to have been confined to the sixth issue, which was in the following terms :—

"Are the plaintiffs precluded from claiming compound interest, or interest exceeding the amount of the principal advanced under Regulation III of 1872."

The High Court found in favour of the mortgagees on this issue, and from that decision the present appeal is brought. But in the hearing before the Subordinate Judge an issue was raised to the jurisdiction of the Court of Bhagalpur to entertain the suit, and this point has again been raised in the argument before their Lordships. Seeing that it is a question of jurisdiction, and depends on no disputed facts, their Lordships are of opinion that they cannot decline to entertain it, although it is not specifically raised on the appeal, more especially as it necessarily presented itself in the argument.

The position of the Sonthal Parganas is very peculiar. They are under separate and special legislation, which differs widely from the legislation applicable to the rest of Bengal. The Lieutenant-Governor of Bengal has the power to vary that legislation from time to time by notifications published in the Calcutta Gazette, under and according to provisions appearing in the regulations relating to the district as will presently be more particularly referred to. At the hearing of the appeal it was found that the documents in the record did not adequately inform their Lordships of the relevant notifications which had thus appeared in the Calcutta Gazette, and, accordingly, it was arranged that the parties supplement the record by putting in copies of such notifications as they thought material. These were furnished to their Lordships in December last, and they affect to an important degree the matters in issue, and more particularly those that turn upon the settlement of the lands to which the mortgage bond relates.

In order to make clear the legal questions that arise in this appeal, it is necessary to explain the nature and sequence of the legislation relating to the Sonthal Parganas.

The special legislation for the Sonthal Parganas commences by an Act of the Governor-General of India in Council, No.

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XXXVII of 1855, which was passed on December 22nd, 1855. Its full title is :—

> " An Act to remove from operation of the General Laws and Regulations certain districts inhabited by the Sonthals and others and to place the same under the superintendence of an officer to be specially appointed for that purposes."

The preamble of the Act recites that the General Regulations and Acts of Government then in force in the Presidency of Bengal were not adapted to the uncivilised race of people called Sonthals, and it was therefore deemed expedient to remove from the operation of such laws certain districts. It then proceeded to enact by clause 1, as follows :—

> "The districts described in the Schedule to this Act are hereby removed from the operation of the General Regulations of the Bengal Code and of the Laws passed by the Governor-General of India in Council except so far as is hereinafter provided and no law which shall hereafter be passed by the Governor-General of India in Council shall be deemed to extend to any part of the said districts unless the same shall be specially named therein."

This is subject to a proviso which is not material to this case.

The Act then proceeds to carry out its main object by the following enactment :—

> "The said district shall be placed under the superintendence and jurisdiction of an officer or officers to be appointed in that behalf by the Lieutenant-Governor of Bengal. . . . . The administration of civil and criminal justice . . . . are hereby vested in the officer or officers so appointed."

This language is perfectly general in its character, and under it the whole administration of civil justice became vested in the officer or officers so appointed. But there follows a proviso to which frequent reference was made in the argument. It reads as follows :—

> " Provided that all civil suits in which the matter in dispute shall exceed the value of Rs. 1,000 shall be tried and determined according to the General Laws and Regulations in the same manner as if this Act had not been passed."

The interpretation of this provision is a matter of great difficulty. Two rival interpretations naturally suggest themselves. The one is that the officers exercising the jurisdiction shall do so in accordance with the general laws and regulations, so that the rights of the parties are unaffected by the provision, although they are to be pronounced upon by a different judicial tribunal.

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The other is that not only the laws that govern rights, but also the procedure to enforce those rights is to remain unchanged. Now it must be observed that this is a proviso and not an exception, and accordingly, taken in connection with the general language of the previous portion of the clause, the former of these two interpretations is the one that commends itself to their Lordships, so that it must be construed as providing that the special officer or officers shall try such suits, but that in trying and determining them they shall observe the General Laws and Regulations obtaining in Bengal, which but for the Act would have applied equally in the Sonthal Parganas. It would seem, however, that the other view has been taken in India (*see* the judgment in *Sorbojit Roy and others* v. *Ganesh Prosad Misser and others* [1]. Subsequent legislation has, however, rendered it unnecessary, so far as the decision in this case is concerned, to decide what would be the state of things if this regulation were still in force unmodified by any other statutory enactments.

The territorial definition of the Sonthal Parganas was originally to be found in the schedule to this Act; but, by Act X of 1857, a new schedule was substituted therefor. The judgment of the High Court finds that two-thirds of the mortgaged properties are situated within the district described in that schedule, and it would seem that this estimate may be assumed to be approximately correct for the purposes of this Appeal.

The next Act in chronological order to which it is necessary to refer is the Code of Civil Procedure of 1859. The Sonthal Parganas are not specially named in that Act, and therefore it did not *prima facie* apply to them; but, nevertheless, we must have regard to the language of section 385 of that Act, which reads as follows :—

> "This Act shall not take effect in any part of the territories not subject to the General Regulations of Bengal, Madras and Bombay, until the same shall be extended thereto by the Governor-General of India in Council or by the Local Government to which such territory is subordinate and notified in the Gazette."

Although the words "Sonthal Parganas" do not appear in this section the district falls under the description there appearing. Accordingly, we find that by a notification on August 19th, 1867, the Code of Civil Procedure of 1859 as

1. (1884) I.L.R. 10 C. 761.

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amended by the Code of Civil Procedure, 1861, was applied to the Sonthal Parganas subject to certain provisions, restrictions and exceptions which are not relevant to the matters of this suit.

It is not necessary to decide what was the precise effect of this notification. It can hardly have been intended that it should apply to the Courts held by the officers appointed by the Lieutenant-Governor of Bengal in those suits in which they were not required to try and determine the case according to the general laws and regulations prevailing in Bengal. But with regard to civil suits in which the matter in dispute exceeded the value of Rs. 1,000, it would seem to have settled the doubt as to whether they were cognizable by ordinary Civil Courts duly established with jurisdiction within the Sonthal Parganas, because it will be found that the fact that such jurisdiction exists in such Courts is recognised in subsequent legislation.

In the year 1872 a new Regulation was passed for the Sonthal Parganas. It is entitled the Sonthal Parganas Settlement Regulation, and by clause 2 it is directed to be read with Act XXXVII of 1855 and Act X of 1857 before referred to. Clause 3 reads as follows:—

> "Subject to the provisions of this Regulation, the Regulations and Acts mentioned in the schedule annexed to this Regulation, or such portions of them as are unrepealed, shall be deemed to be in force in the Sonthal Parganas. No other Regulations or Acts shall be deemed to be in force in the Sonthal Parganas except so far as regards the trial and determination of the civil suits mentioned in Section 2, Act XXXVII of 1855, in which the matter in dispute exceeds the value of Rs. 1,000, when such suits are tried in the Courts established under Act VI of 1871."

It further provides that the Lieutenant-Governor of Bengal may by notification in the Calcutta Gazette add to or take away from the list in the schedule.

To arrive at the true meaning and effect of these provisions it is necessary to bear in mind that at the date of this Regulation the Code of Civil Procedure 1859 as amended by the Code of Civil Procedure, 1861, applied to the Sonthal Parganas by virtue of the notification of August 19th, 1867. But the schedule to the Regulation does not contain the Civil Procedure Codes of 1859 and 1861, nor have they ever been added to the above list by any notification of the Lieutenant-Governor of Bengal as above described. It follows that these Civil Procedure Codes were thereafter applicable in the Sonthal Parganas only

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so far as concerns the trial and determination of civil suits in which the matter in dispute exceeded the value of Rs. 1,000 when such suits were tried in the Courts established under Act VI of 1871. So far as such suits were concerned there is nothing in this clause of the Sonthal Parganas Settlement Regulation to alter the effect of the Notification of August 19th, 1867, which applied to them the Civil Procedure Code of 1859 as amended in 1861.

Act VI of 1871 is known as the Bengal Civil Courts Act, 1871. It is not in the scheduled list. But it was passed at a date when the Code of Civil Procedure, 1859, as amended by the Code of Civil Procedure, 1861, was in force in the Sonthal Parganas, and it would seem as though the wide provisions of the clauses in those Codes giving jurisdiction to Civil Courts must be taken to have given to the Government power to appoint Judges under it within the Sonthal Parganas, inasmuch as S. 4 of the Sonthal Parganas Regulation, 1872, provides as follows:—

"The Lieutenant-Governor of Bengal may, by notification in the Calcutta Gazette, invest any competent officer in the Sonthal Parganas with the powers of any Civil Court established under Act VI of 1871, and may exclude the whole or any part of the said Parganas from the jurisdiction of any of the Courts established under the said Act now having jurisdiction therein."

But while it is evident that the Government by this section left it to the Lieutenant-Governor of Bengal to decide in future whether Courts established under the Bengal Civil Courts Act, 1871, should retain jurisdiction within the Sonthal Parganas, it had already made up its mind that such should not be the case with suits relating to lands pending the completion of the settlement which they proposed forthwith to make of all the lands situated in the Sonthal Parganas. This is made clear by section 5, which reads as follows:—

"Till such time as a settlement of the whole or any part of the Sonthal Parganas shall be made under the rules hereinafter provided, and the said settlement shall be declared by a notification in the Calcutta Gazette to have been completed and concluded, no suit shall lie in any Court established under the said Act VI of 1871 in regard to any land, or any interest in or arising out of any land, or for the rent or profits of any land or, regarding any village headship or other office connected with the land except as hereinafter provided; but such suits shall be heard and determined by the officers appointed by the Lieutenant-Governor of Bengal under S. 2 of the said Act XXXVII of 1855, or by the Settlement Officers hereinafter mentioned, according as the said Lieutenant-Governor shall from time to time direct."

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Then follows a proviso by which the officer empowered to try a suit may transfer it to a Court established under the said Act, and thereby give to the Court jurisdiction to try it. No question, however, under this proviso, arises in the present case.

The critical question in this suit is as to whether clause 5 excludes from the jurisdiction of Courts established under the Bengal Civil Courts Act, 1871, suits relating to land where the value of the matter in dispute is more than Rs. 1,000. Their Lordships are of opinion that to this question only one answer can be given. The language of the section is so wide and so peremptory that it gives to the officers therein mentioned sole and exclusive jurisdiction in all suits in regard to any land, or any interest in or arising out of any land, for the rent or profits of any land. To make the meaning clearer and to render the language more emphatic, it is expressed both in the positive and in the negative form. On the one hand it provides that "no suit shall lie in any Court established under the said Act 6 "of 1871 in regard to any land, &c.," and on the other hand it provides that such "suits shall be heard and determined by the "officers, &c." It is impossible not to give to such language the full effect of creating an exclusive jurisdiction. It follows, therefore, that no action relating to land in the Sonthal Parganas can be brought otherwise than before such officers so long as section 5 is in force with respect to the district in which that land is situated. There is no difficulty in comprehending the motives for such legislation. The section shows that a settlement of the lands was in contemplation, and evidently the aim of the provision was to prevent any clash of jurisdiction between different Courts in matters relating to land until such time as the Government proclaimed the settlement to be completed—a very intelligible policy when it is considered that on the results of such suits between individuals might depend the entries which must be made in the settlement records.

The object of the regulation being thus to throw the whole of the jurisdiction in suit relating to land into special Courts established in and for the Sonthal Parganas, and provision being made for extending that exclusive jurisdiction to all suits, one has to consider the meaning and effect of S. 6, which is the

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section upon which the rights of the parties in the present suit depend. That section, so far as is material, reads as follows :—

> " All Courts having jurisdiction in the Sonthal Parganas shall observe the following rules relating to usury, namely :—
>
> " (a) . . . . . no compound interest arising from any intermediate adjustment of interest shall be decreed ;
>
> " (b) the total interest decreed on any loan or debt shall never exceed one-fourth of the principal sum, if the period be not more than one year, and shall not in any other case exceed the principal of the original debt or loan."

The respondents sought to establish that the phrase "all Courts having jurisdiction in the Sonthal Parganas" meant Courts locally situated in the Sonthal Parganas, and dealing with matters purely local. Their Lordships cannot accept this interpretation. The words are definite and precise, and must be applied in their natural signification. It was urged that, taken literally, they would apply to everything done by a Court having jurisdiction in the Sonthal Parganas, whether the matter related to those districts or not, inasmuch as the language used makes the application of the enactment depend on the Court and not on the matter in dispute. But this is to ignore the fact that the Regulation is only applicable to the Sonthal Parganas, and that, therefore, it would not apply to Courts having jurisdiction wider than these local limits when such Courts were dealing with matters relating solely to other parts of India. The enactment, therefore, applies to Courts having jurisdiction in the Sonthal Parganas, and acting under and by virtue of such jurisdiction.

The importance of the section is very great. It is a protective section clearly dictated by the fundamental consideration to which reference has already been made, and which led to the Sonthal Parganas being put under separate and special legislation, namely, that—

> " The General Regulations and Acts of Government now in force in the Presidency of Bengal are not adapted to the uncivilised race of people called Sonthals, and it is, therefore, expedient to remove from the operations of such laws."

the districts known as the Sonthal Parganas.

The provision, therefore is not one of procedure but of substance, and so far as the Courts having jurisdiction within the Sonthal Parganas are concerned it places all contractual stipulations as to compound interest in a position of non-enforceability,

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and limits statutably the total interest which can be decreed on any loan or debt. The application of these provisions to the facts of the present case will be considered later.

The next Act in chronological sequence to which reference was made in the argument is Act XIV of 1874, known as the Scheduled Districts Act, 1874. This is an Act for the purpose of removing doubts as to what Acts or regulations are in force in parts of British India, which have never been brought within or have from time to time been removed from the operation of the general Acts and regulations and the jurisdiction of the ordinary Courts of Judicature. These parts of British India are termed in the Act "Scheduled Districts." They are all set out in the First Schedule to the Act, and amongst them are to be found the Sonthal Parganas. The scheme of the Act is peculiar. It is expressly made to apply to all parts of British India other than the Scheduled Districts. But it is provided that it shall come into force in any scheduled district upon the issue of a notification under S. 3 of the Act with regard to such district. In such case the local Government may with the previous sanction of the Governor-General in Council by notification in the Gazette of India, and also in the local Gazette declare (among other things) what enactments are actually in force in any of the scheduled districts, and every such notification shall be binding on all courts of law. During the argument counsel for the parties were not in agreement as to whether any notification under this Act had been issued applying to the Sonthal Parganas; but from the subsequent information supplied to their Lordships, it would appear that no such notification has been issued, and therefore that the provisions of the Scheduled Districts Act, 1874, have never been applied to them. It is, therefore, unnecessary to discuss further the provisions of this enactment.

The next Act which requires to be noticed is the Civil Procedure Code, 1877. It repeals Act VII of 1859 and Act XXIII of 1861, which constituted the then existing Code of Civil Procedure. Section 1 reads as follows :—

"This Act may be cited as 'The Code of Civil Procedure' and it shall come into force on the first day of October 1877.

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"This section and section 3 extend to the whole of British India. The other sections extend to the whole of British India except the scheduled districts as defined in Act No. XIV of 1874."

The relevant part of section 3 reads as follows :—

"The enactments specified in the First Schedule hereto annexed are hereby repealed to the extent mentioned in the third column of the same schedule.

"But when in any Act, regulation or notification passed or issued prior to the day on which this Code comes into force reference is made to Act VIII of 1859, Act XXIII of 1871 or 'The Code of Civil Procedure' or to any other Act hereby repealed, such reference shall so far as may be practicable be read as applying to this Code or the corresponding part thereof."

The effect of these sections is to make the notification of 1867 relative to the application of the then existing Codes of Civil Procedure to the Sonthal Parganas read as though it applied to the Civil Procedure Act, 1877. But it will be remembered that such application had been restricted by the Sonthal Parganas Regulation of 1872 to suits brought for amounts above Rs. 1,000 in courts established under Act VI of 1871. The combined effect of these provisions must be to make the Civil Procedure Act of 1877 apply in the Sonthal Parganas only to suits so brought.

The next Act is the Civil Procedure Code of 1882. In everything that is material to the present appeal this is identical with the Civil Procedure Code, 1877. It took the place of that Act in the Sonthal Parganas to the extent that such Act was in force therein, that is to say, for suits brought for amounts above Rs. 1,000 in Courts established under Act VI of 1871.

We now come to Regulation 5 of 1893, the short title of which is the Sonthal Parganas Justice Regulation, 1893. It made important changes in the administration of civil justice in the Sonthal Parganas. By section 5 it added to the two classes of special Courts theretofore existing in the Sonthal Parganas, named the Courts of settlement officers and the Courts of officers appointed by the Lieutenant-Governor of Bengal under section 2 of the Regulation of 1855, a third class, namely Courts established under Act XII of 1887, known as the Bengal United Provinces and Assam Civil Courts Act, 1887, which is an Act which has taken the place of Act VI of 1871 (which has

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been repealed), and all references to the last-mentioned Act must now be read as referring to it.

These definite provisions entirely remove the difficulties as to the jurisdiction within the Sonthal Parganas of Courts appointed under the Bengal United Provinces and Assam Civil Courts Act, 1887, or its predecessor, the Bengal Civil Courts Act, 1871. It remains to see what suits are put within the congizance of these Courts. By S. 9 the jurisdiction of a Judge of one of these Courts extends to—

"Suits of which the value exeeeds Rs. 1,000 and which are not excluded from his cognizance by the Sonthal Parganas Settlement Regulation, or by any other law for the time being in force."

Their Lordships are clearly of opinion that these words of exclusion refer to S. 5 of the Regulation of 1872, which excluded from the cognizance of any such Court suits relating to land, the settlement of which had not been finished and duly notified, and placed them exclusively in the hands of settlement officers or officers appointed by the Lieutenant-Governor of Bengal under section 2 of the Regulation of 1855. This exclusive jurisdiction is therefore maintained, and suits in regard to land, which is not in districts that have been notified as being completely settled, are not within the cognizance of the ordinary Courts, no matter what may be the value of the matter in dispute. It is not necessary for the purpose of this appeal to examine further into the jurisdiction of Courts established under these provisions, because the Court of Baghalpur, in which the present action was brought, is not one of such Courts.

The result of this examination of the Acts and Regulations applicable to the Sonthal Parganas is that at the date when this suit was commenced no suit could lie in any Court established under Act VI of 1871, or under the Act which has taken its place, namely, the Bengal United Provinces and Assam Civil Courts Act, 1887, in regard to any land or any interest in or arising out of any land or for the rent or profits of any land, but such suits must have been brought before settlement officers, or Courts of officers appointed by the Lieutenant-Governor of Bengal under S. 2 of the Sonthal Parganas Act, 1855, and the Sonthal Parganas Justice Regulation Act, 1893, Part 2, so long as the land had not been settled and the settlement declared by a notification in the Calcutta Gazette to have been completed and

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concluded. And, further, that whatever be the Court that has jurisdiction to decide cases within the Sonthal Parganas, and is exercising that jurisdiction, it must observe the two rules relating to usury above referred to.

It is necesssary therefore to ascertain what was the exact position (so far as settlement is concerned) of the land included in the mortgage bond at the date of the commencement of the action in which the present appeal is brought, namely, June 20th, 1904. The information supplied to their Lordships by the parties, as to the notifications appearing in the Calcutta Gazette show conclusively that, although portions of the lands mortgaged had been settled, and notification had been duly made that such settlement had been completed, at dates prior to the institution of the suit, other portions were not so settled. It is clear, therefore, that the suit came within the provisions of S. 5 of the Sonthal Parganas Settlement Regulation, 1872, relating to the exclusive jurisdiction of officers appointed by the Lieutenant-Governor of Bengal, or by settlement officers, inasmuch as it related to land which had not been settled, or the settlement of which had not been declared by a notification in the Calcutta Gazette to have been completed and concluded. The Court of the Baghalpur had therefore no jurisdiction to entertain the suit, and this appeal must be allowed.

Reliance was placed by counsel for the Respondent on the stipulation in the bond that the mortgagees might enforce it in the Court of Bhaghalpur. Their Lordships are of opinion that this has no effect. That Court had no jurisdiction to entertain the suit which, beyond question, was a suit in regard to land in the Sonthal Parganas, and that being so the parties could not give it the necessary jurisdiction by consent. To do so would be to nullify the express prohibition of S. 5 of the Sonthal Parganas Regulation, 1872, which was binding on any Court having jurisdiction in the Sonthal Parganas in the exercise of such jurisdiction.

Their Lordships are also of opinion that, apart from the question of jurisdiction, any Court dealing with the subject matter of the suit would be bound to give full force and

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effect to the provisions of S. 6 of the Sonthal Parganas Settlement Regulation, 1872, relating to usury, and therefore to have refused to decree any compound interest arising from any intermediate adjustment of interest, or an amount of total interest exceeding the principal of the original debt or loan.

Their Lordships will, therefore, humbly advise His Majesty that this appeal should be allowed, and the action dismissed with costs in both courts. The Respondents must pay the costs of this Appeal. The two subsidiary Appeals fall with the dismissal of the Action, and the costs connected with them will form part of the costs of the whole proceedings, which the Respondents must bear.

Solicitors for Appellants: *T. L. Wilson & Co.*

Solicitors for Respondents: *Morgan, Price & Co.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Seshagiri Aiyar, and Mr. Justice Kumarasami Sastri.

Balasidhantam and others ... *Appellants**
v. *(Defendants 1 to 4)*
Perumal Chetti, and others ... *Respondents (Plaintiffs and Defendants 1, 7 to 10, 5 and 6 and 3rd Legal Representative.)*

Balasidhantam v. Perumal Chetti.

Mortgage—Relationship of Mortgagor and mortgagee—Tender or deposit—No cessation by—Court Fees Act, S. 7, cl. XI (cc)—Suit under—Title cannot be gone into.

In a suit brought under S. 7, Cl. XI (cc) of the Court Fees Act paying court-fee upon one year's rent, the court cannot go into title and give a decree on that footing.

By the mere fact of a valid tender or deposit the relationship of mortgagor and mortgagee does not cease and as such the fact of such tender or deposit is no defence to a suit by the mortgagee for the recovery of possession brought against the mortgagor who is in possession under a lease from him.

Satyabadi Behara v. *Harchati* (1). *Rukmani Bai* v. *Venkatesh* (2) relied on.

Second appeal from the decree of the District Court of Salem in A. S. No 162 of 1910 preferred against the decree of the Court of the Principal District Munsif, Salem, in O. S. No. 19 of 1910.

The suit was by a landlord for the rcovery from his tenant of the arrears of rent due by the latter and for ejectment on the

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*S. A. 2093 of 1912. 10th August' 14.

1. (1907) I. L. R. 34 C. 223. 2. (1907) I. L. R. 31 B. 527.

Bala-sidhantam. v. Perumal Chetti.

ground that the term of the tenancy had expired. The defences were that the plaintiff was only a mortgagee of the suit land, that as the defendant had deposited the mortgage amount long before the date of suit and the plaintiff refused to receive the amount, he was not entitled to recover rent accrued due after the date of the deposit, and that the suit ought therefore to be dismissed. The courts below decreed the suit. With regard to the contention of the defendant that the plaintiff was only a mortgagee, they held that the deeds relied upon as constituting a mortgage by conditional sale evidenced not a mortgage by conditional sale but a sale with an agreement for re-purchase. This question turned upon the construction of the deeds (1) an out and out sale in favour of the plaintiff (2) an agreement of even date by the plaintiff in favour of his vendor undertaking to reconvey the land on compliance with certain conditions (3) a rental agreement by the vendor in favour of the plaintiff, on which the suit was brought. The defendant preferred the above second appeal to the High Court on the grounds, amongst others, that the transaction evidenced by the three deeds was only a mortgage by conditional sale and that in view of the tender of the mortgage amount by the defendant referred to above, the plaintiff was not entitled to rent after the date of the tender.

V. Venkatachariar for appellant referred to the terms of the three deeds in support of his position that the transaction was only a mortgage by conditional sale and cited *Kalka Prasad* v. *Bhudyan* [1], *Muthu Venkata Chelapathi* v. *Pyda Venkata Chalapathi* [2], *Balkishen Das* v. *W. F. Legge* [3], *Ramayya* v. *Kishnamma* [4]

B. Sitarama Rao for the respondent. Question of mortgage or no mortgage need not be gone into. The suit is by the alleged mortgagee on a rental agreement executed in his favour. The plaintiff is entitled to possession till he is redeemed. Mere deposit into court of the mortgage amount does not put an end to the relationship of mortgagor and mortgagee *Satyabadi Behara* v. *Harchati* [5], *Rukmani Bai* v. *Venkatesh* [6].

1. (1909) I. L. R. 31 A 300.
2. (1903) I. L. R. 27 M 348.
3. (1899) I. L. R. 22 A 149.
4. (1899) I. L. R. 23 M 114.
5. (1907) I. L. R. 34 C 223.
6. (1907) I. L. R. 31 B 527.

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The Court delivered the following

Judgment:—The suit was brought under S. 7, cl. XI (cc) of the Court Fees Act on payment of the court fees upon one year's rent. Therefore the title of the plaintiffs need not be gone into in this case. We express no opinion whether the documents, Ex. A, B, & 1, constitute a sale with a condition to repurchase or a mortgage by conditional sale. We are not to be understood as agreeing with the conclusion at which the Courts below have arrived upon this point.

It is argued that as the full amounts mentioned in Exhibits A and B have been deposited in Court, the plaintiffs are not entitled to a decree for rent. As was pointed out in *Satyabadi Behara* v. *Harabati* [1] and in *Rukmani Bai* v. *Venkatesh* [2], mere deposit of the amount does not put an end to the relationship already subsisting. Even if the plaintiffs were only mortgagees so long as Exhibit B subsists, they can sue for possession and for rent under it. We agree with the decisions of the Calcutta and Bombay High Courts and hold that the payment into Court has not taken away from the plaintiffs the right to sue for possession under Exhibit B. We uphold the decree solely upon this ground. We think this is a fit case in which the parties should bear their own costs in this court.

The Second Appeal is dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sadasiva Aiyar

Mala Naicker & another .. Petitioners (*Accused*)

Mala Naicker *In re.*

The Indian Treasure Trove Act (*Act VI of* 1878) *Ss.* 4, 20—*Finder—Cooly acting under the eye of the employer—No control over treasure—Effect of.*

The accused, two coolies working for hire under the eye of their employers turned up a box containing hidden treasure. The treasure was removed by the employers and the accused had no control over it at any time. Nevertheless, they were prosecuted under S. 20 of the Treasure Trove Act and convicted.

Held that they were finders within the meaning of the act and though they would not be liable for not depositing the treasure if they had no control over it, they were liable for non-compliance with the other conditions imposed on them by S. 4 and were properly convicted.

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* Cr. Rev C. No. 201 of 1914 and Cr. Rev P. No. 171 of 1914.
10th September 1914.

1. (1907) I. L. R. 34 C. 223. 2. (1907) I. L. R. 31 B 527.

Mala Naicker In re.

Petition under Ss. 435 & 439 of the Code of Criminal Procedure 1898 praying the High Court to revise the Judgment of the 1st class Assistant Magistrate of Trichinopoly in Cr. App. No. 1 of 1914 preferred against the Judgment of the Stationary 2nd Class Magistrate of Namakkal in C. C. No. 554 of 1913.

The petitioners, who are the accused in the case, are two coolies working for wages engaged by their employers in cutting a margosa tree for the repairs of a local Mariamman temple. While so engaged, they found a box which on being opened revealed treasure worth about 5,000 or 6,000 Rupees. When the box was found his employers were present and several others were also present when the box was opened. The property was then removed to the house of one of the employers and thereafter was disposed of secretly. The Collector sanctioned the prosecution; and the two accused were prosecuted under S. 20 of the Madras Treasure Trove Act, as finders.

On the question, whether the petitioners can be considered to be finders, the lower appellate Court observed :—

"The word "finder" is not defined in the Act. The appellants urge that they were mere coolies working for hire under the eye of 2 employers and that consequently, the latter are not to be considered finders. I cannot agree with this view. Had the coolies been employed for the express purpose of digging for hidden treasure, I think their case might be arguable but they were simply employed to cut down a tree and in the course of the work they turned up this box. If any question of a reward arose, I think they could undoubtedly claim as " finders "; conversely it seems to me that they must be considered to have the duties and responsibilities laid down by section 20 of the Act."

The accused were convicted by both the lower Courts and applied in revision to the High Court.

P. R. Narayanasami Aiyar for Petitioners.

P. R. Grant for the Public Prosecutor.

P. R. Narayanaswami Aiyar :—The term 'finder' is not defined in the Act. But reading S. 4 and S. 20 of the Act, I submit it is clear that a finder is one who does not merely see the find taken or dealt with it in any manner, but one who has some sort of physical control over the

treasure. A finder, under S. 4, is asked to give notice, to the Collector, of the nature of the treasure and to deposit it in the treasury, or give security for its production. The object of the Act is clear, *viz.*, to secure the treasure. Moreover, a wide construction will bring within the penal clause, even innocent passers-by who happen to see a find taken or removed. In this case the cooly accidentally came across the treasure which was removed to his employer's house. Although he saw the treasure, he could neither deposit it, nor produce it, when called upon. Consequently he is not a finder.

P. R. Grant :—The cooly also is found to have participated in the treasure, though not largely.

The Court made the following

Order:—The two accused (very poor coolies) have been convicted and sentenced under S. 20 of the Treasure Trove Act (VI of 1878) read with S. 4.

Their contention in revision is that neither of them is a 'finder' of the Treasure within the meaning of that term as used in S. 4. The term "finder" is not defined in the Act and the established fact is that the accused discovered the treasure buried in the ground while they were cutting a tree under the orders and in the presence of their employer.

I think that the accused were "finders" of the treasure even though they found it in the course of the performance of labor for an employer. It is contended that because the concluding portion of S. 4 imposes a duty on the "finder" "to deposit the treasure in the nearest Government Treasury and etc," a person who has not the physical control of the treasure found by him cannot be a "finder" under that section, and that in this case, the accused's employer at once assumed control over the treasure.

I think that the meaning of the term "finder" cannot be restricted by reason of one of the obligations imposed on the finder being to deposit the treasure in the Treasury. If it is impossible for him to discharge that particular obligation, he should be held absolved from its performance as nobody could be convicted under the criminal law for not doing an impossible act, unless the terms and intention of the statute are absolutely clear and inflict a penalty on even an innocent person. I therefore see no reason to interfere with the conviction.

Mala Naicker In re. — Sadasiva Aiyar J.

As regards the sentences, the accused are stated by the sub-magistrate to be "the poorest of the villagers" there is no legal evidence that they obtained a substantial or any portion of the Treasure Trove and though it seems clear that some rich person or persons is or are assisting them in filing this revision petition and assisted them in their defence in the Lower Courts, I do not think that these facts can be taken into consideration in arriving at a conclusion as to what is the reasonable fine which could be imposed on the accused. The fine of 50 Rs. imposed on the 2nd Petitioner is therefore reduced to 10 Rupees and the balance (if already recovered) will be refunded to him. In other respects the petition is dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Oldfield, and Mr. Justice Seshagiri Aiyar.

Aiya Koundan and others ... *Appellants** (*Petitioners*) in C. R. P. No. 698 of 1911 on the file of the High Court.

v.

Jagan Mandalathipathiar, Gopanna Marudiar ... *Respondents* in...do.

Aiya Koundan v. Jagan Mandalathipathiar.

Civil Procedure Code, or XXIII R. (1) (2) a & b—Sufficient ground—Ejusdem generis —C. P. C., S. 115—Material irregularity—Letters Patent—Appeal—S. 15—Order dismissing revision petition.

Where after a substantial portion of the plaintiff's evidence had been heard, on his affidavit that (1) he could not attend the hearing owing to his brother's death (2) that he wished for the issue of a commission and (3) that he had to get certain measurements made and a plan prepared, the Court gave him permission to withdraw the suit with liberty to sue afresh.

Held that the sufficient ground referred to in O. XXIII, R. 1 (2) (b) must be *ejusdem generis* with the defect referred to in Rule 1 (2) (a) and as the ground on which permission was granted in this case was not such a ground, the court's action was one without jurisdiction.

That even otherwise in the circumstances of the case, the Court acted with material irregularity in granting the permission *Bai Kashi bai* v. *Shidapa Annappa* (1) followed.

An appeal lies under the Letters Patent from an order of a single Judge of the High Court dismissing a revision petition filed against an order giving leave to withdraw a suit with liberty to sue again. *Rama Aiyar* v. *Venkatachalla Padayachi*(2) followed.

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* L. P. A. No. 7 of 1913. 19th August 1914.

1. (1913) I. L. R. 37 B. 682. 2. (1906) I. L. R. 30 M. 311.

Aiya Koundan v. Gopanna Maradiar.

Appeal under S. 15 of the Letters Patent against the order of the Honourable Mr. Justice Sankaran Nair dated 12th December 1912 in C. R. P. No. 698 of 1911, presented against the order of the Court of the District Munsif of Udumalpet in O. S. No. 665 of 1910.

T. Ramachandra Rao for Appellants.

T. R. Venkatrama Sastri for Respondents.

The Court delivered the following

Judgment:—We disallow the preliminary objection that no Letters Patent Appeal lies with reference to *Rama Aiyar* v. *Venkatachella Padayachi* [1]. There is no doubt that an ill-advised grant of permission to withdraw a suit with leave to sue again under O. XXIII, R. 1 (2) (b) may be such a material irregularity as is contemplated by S. 115 (c) of the Civil Procedure Code. Here the District Munsif granted permission, after a substantial portion of the plaintiff's case had been heard, on his affidavit that (1) he could not attend the hearing owing to his brother's death (2) he wished for the issue of a commission, apparently then first mentioned (3) that he had to have certain measurements made and a plan prepared.

We are prepared to hold that the "sufficient ground" referred to in O. XXIII, R. 1 (2) (b) must be *ejusdem generis* with the defect referred to in Rule 1 (2) (a) with reference to the usual interpretation of these words elsewhere in the Code, and to the explicit authority of *Burathgunta Pentadu* v. *Kurla Pathi Rajamma* [2]. And that it is clear that the District Munsif acted on nothing in any way resembling a formal defect and that his order is unsustainable. But whether or no this interpretation of the phrase "sufficient ground" be adopted, we must hold that his discretion was not exercised judicially, since it was exercised in spite of the defendants' opposition to condone defects in the plaintiff's conduct of his case, which were due entirely to his own default and for which no excuse was attempted. The facts closely resemble those dealt with in *Bai Kashi Bai* v. *Shidappa Annapa* [3], a decision in which we express our respectful concurrence. The Letters Patent Appeal and Petition are allowed with costs. The District Munsif's order is set aside and he is directed to restore the suit and dispose of it according to law.

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1. (1906) I. L. R. 30 M. 311.
2. (1911) M. W. N. 105.
3. (1913) I. L. R. 37 B. 683.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

Mulpuri Veerayya and another ... *Appellants* *
(*Plaintiffs*)

v.

Sanaya Varpu Sivayya and another ... *Respondents*
(*Defendants.*)

Veerayya v. Sivayya.

Vendor and purchaser—Contract of sale of immoveable property—Time of the essence of contract—Finding of fact—Postal offer of expenses of sale deed—Not valid—Earnest money—Right of vendee to retain on default.

Where after considering all the circumstances, the lower courts have come to the conclusion that time is of the essence of a contract for the sale of immoveable property, the High Court cannot in second appeal, interfere with that finding.

An offer by post to pay the expenses of executing the sale deed is not a legal tender of those expenses.

Where a contract of sale falls off by reason of the default of the vendor, the vendee is entitled to retain the earnest money *Natesa Aiyar* v. *Appavu Padayachi* (1) followed.

Second appeal from the decree of the District Court of Kistna in A. S. No. 13 of 1912 preferred against the decree of the Court of the Temporary Subordinate Judge of Masulipatam in O. S. No. 17 of 1909.

N. S. Narasimhachariar (*with V. Ramdass*) for Appellants.

V. Ramesam for Respondents.

The Court delivered the following

Judgment:—We cannot assume that the lower appellate Court ignored the equitable presumption that time is not of the essence of the contract in cases of contracts for sale and purchase of landed property. Its finding of fact, after a consideration of the evidence and the circumstances, that both parties intended time to be of the essence of the contract, cannot therefore be interfered with in second appeal.

We must also accept the finding of the lower appellate Court that the plaintiff's failed to perform that portion of the contract which they had to perform first (namely), the tender of the expenses of the execution and registration of the sale deed to defendants before the plaintiffs could call upon the defendants to execute the sale deed. A mere offer by postal letter to tender such expenses is not a legal tender.

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*S. A. 1264 of 1913. 16th September 1914.

1. (1913) 21 M. L. J. 488.

The question again of the right of the defendants (respondents) to a forfeit of the earnest money on plaintiff's failure must be decided in the defendants' favor on the strengh of the recent Full Bench ruling in *Natesa Aiyar* v. *Appavu Padayachi* [1]. Veerayya v. Sivayya.

The Second Appeal fails and is dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sadasiva Aiyar, and Mr Justice Napier.

Bir Mohamad Rowther ... *Appellant** (3rd *Defendant.*)

v.

Nagoor Rowther, and another ... *Respondents.* (*Plaintiffs.*)

Bir Mohamad Rowther v. Nagoor Rowther.

Mortgage—Redemption—Right of the mortgagor to redeem before the expiry of the term.

Having regard to the judgment of the Privy Council in *Bakhtawar Begam* v. *Husaini Khanum* (2), in the absence of a contract to the contrary, a mortgage cannot be redeemed before the expiry of the term mentioned in the deed.

Observations in *Rose Ammal* v. *Rajaratna Ammal* (3), held to be overruled.

Second Appeal from the decree of the Court of the Subordinate Judge of Trichinopoly in Appeal Suit No. 306 of 1911 preferred against the decree of the Court of the District Munsif of Srirangam in O. S. No. 177 of 1910.

This was a suit by a usufructuary mortgagee for obtaining possession of the mortgaged property from a subsequent purchaser from the mortgagors, the 3rd defendant in the suit, who was in possession of the property. Among other pleas, the 3rd defendant offered to redeem the mortgage in this suit itself.

The terms of the mortgage deed so far as material were as follows.

" As we have received these one thousand rupees from you under these two heads, you will enjoy the undermentioned lands etc., paying the circar kist thereof yourself; *you will receive the said principal sum of Rupees one thousand in a term of 7 years and surrender the lands.*" Both the lower Courts decreed

* S. A. 1557 of 1912. 27th July 1914.

1. (1913) 24 M. L J. 488. 2. (1913) I. L. R. 36 All. 195. s.c. 26 M. L. J. 474.
3. (1898) I. L. R. 23 M. 33.

Bir Mohamad Rowther v. Nagoor Rowther.

possession to the plaintiff; and the 3rd defendant preferred the second appeal.

N. Rajagopala Chariar for the appellant. The condition entitles the mortgagor to redeem even earlier than the seven years; the period is fixed only for the convenience of the mortgagor, and not of the mortgagee. He can redeem within 7 years unless the mortgage deed expressly prohibits it. *Rose Ammal* v. *Rajaratnam* [1], *Setrucherla* v. *Vairicherla*, [2] *Radha Krishna Panda* v. *Madhava Naik* [3]. The above view has found favour with the Privy Council in *Bhaktawar Begum* v. *Hussaini Khanam* [4].

K.V. Krishnaswami Aiyar for the respondents was not called upon.

The Court delivered the following

Judgment:—We must follow the Privy Council Ruling in *Bakhtawar Begam* v. *Husaini Khanaum* [4] and if there are some observations in *Rose Ammal* v. *Rajaratna Ammal*[1] which cannot be reconciled with that ruling, those observations must be held to be overruled. The effect of the Privy Council ruling is that the mortgagor cannot be allowed to redeem the mortgagee before the expiry of the term mentioned in the mortgage deed unless there is a contract to the contrary in favour of the mortgagor. There is no evidence of any such contract in this case. The usufructuary mortgagees (plaintiffs) are therefore entitled to remain in possession for the seven years term agreed upon between themselves and the mortgagors and hence they cannot be redeemed by the appellant (3rd defendant) who is a purchaser of the mortgagors' right) in this suit which was brought before the term of 7 years expired.

This is the only arguable point in this second appeal and as that has failed we dismiss the second appeal with costs.

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1. (1898) I.L.R. 23 M. 33 2. (1880) I.L.R. 2 M. 314.
3. (1906) 17 M.L.J. 83. 4. (1913) I.L.R. 36 A. 195. s.c. 26 M.L.J. 474.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Wallis and Mr. Justice Miller.

Arunachala Pillai *alias* Masilamani Pillai ... *Appellant** (*Plaintiff*)

v.

Sampurna Thachi ... *Respondent* (*Defendant.*)

Arunachalla Pillai *v.* Sampurna Thachi.

Hindu Law—Alienation—Grandfather—Consent by guardians of minor Coparcener—To avoid partition by and alienating whole share—Validity of.

The guardians of a minor coparcener may validly bind the minor by consent given to an alienation by his undivided grandfather of a portion of the family property to avoid the more injurious eventuality of the latter effecting a partition (which in law he could do without anybody's consent) and alienating the whole of his share got at the partition.

Second appeal from the decree of the District Court of Tanjore in A. S. No. 1030 of 1903 presented against the decree of the Court of the District Munsif of Valangiman in O. S. No. 8 of 1902.

P. S. Sivaswami Aiyar for Appellant.

P. R. Sundara Aiyar and *T. V. Gopalsami Mudaliar* for Respondent.

The Court delivered the following

Judgment:—The appellant and his grandfather were members of a joint family and the grandfather had a third wife who had borne him three daughters. Ex. I is an alienation by the grandfather of a portion of the family properties in favor of the 3rd wife reserving the income to himself for life, and is expressed in the deed to be made out of the grandfather's share and excluding the plaintiff's share. The properties covered by Exhibit I were worth about Rs. 3,000 and the remaining properties which are now in the possession of the plaintiff are worth Rs. 7,000 or 8,000. According to the finding of both the lower Courts the deed Ex. I was executed by the grandfather with the consent both of the mother and the maternal uncle of the plaintiff who was then a minor. There has been a good deal of argument before us as to whether Ex. I itself effects a partition between the grandfather and the plaintiff, but in our opinion it is unnecessary to consider this question. It is clear that it was open to the grandfather, if he had so chosen and without anyone's consent to effect a partition and leave the

*S. A. 1279 of 1904. 19th September 1907.

Arunachalla Pillai v. Sampurna Thachi.

whole of his half-share to his 3rd wife and her daughters, and it was in our opinion clearly for the benefit of the minor for his guardians to avoid an eventuality so injurious to his interests by consenting to the alienation effected by Ex. I. If the plaintiff had been of full age his consent would undoubtedly have been sufficient to validate Ex. I and in the circumstances we think his guardians were competent to consent for him. This is in effect the conclusion at which the District Judge has arrived and the second appeal must be dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sankaran Nair and Mr. Justice Spencer.

Gotepati Subban and others ... *Appellants* * (*Plaintiffs*)

v.

Gotepati Narasamma and others ... *Respondents* (*Defendants*)

Gotepatti Subban v. Gotepatti Narasamma.

Res judicata—Minor—Guardian—Gross negligence of—False plea of adoption and neglect to set up right under will—Decree not binding against minor—Hindu Law—Widow—Decree in favour of, as representing estate—Suit by reversioner against—Not res judicata.

A minor is not bound by a decree passed against him if he is able to show that his guardian was guilty of gross negligence.

Where the guardian deliberately setting up a false plea of adoption, neglected to put forward the rights of the minor under a will of which he was aware,

Held, that a decree obtained under those circumstances against the minor would not operate as *res judicata* against him.

Held: *Per Spencer J*:

A judgment in favour of the widow as representing the estate of her husband against a stranger will not operate in favour oi the reversioners suing her so as to preclude her from setting up that she was entitled to the estate of her own right under a will of the husband.

Ashar Reza Khan v. *Mahomed Mehdi Hossein Khan* (1,) foll.

Appeal from the decree of the Court of the Temporary Subordinate Judge of Masulipatam in O. S. No. 36 of 1909 on the file of the District Court of Kistna.

P. Narayanamurthi for Appellants.

S. Srinivasa Aiyangar and *V. Ramdass* for Respondents.

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* A. 57 of 1911. 19th August 1914.

1. (1913) I.L.R. 30 C. 556 (P.C.)

Gotepatti Subban v. Gotepatti Narasamma.

Sankaran Nair J.

The Court delivered the following

Judgments.—*Sankaran Nair, J* :—This is an appeal by the plaintiffs from the decree of the Subordinate Judge of Masulipatam declaring that an alienation of the properties in suit in favor of the 2nd defendant by the 1st defendant, the widow of the last male owner is not binding on them and defendants 3 and 4 who are expectant reversioners. Bapanna the last male owner died in the year 1881. In 1882 his widow the 1st defendant sued to recover possession of the properties from the 2nd defendant who was then a minor. His father as his guardian contended in that suit that his son the 2nd defendant was adopted by the deceased. The Court found that there was no such adoption and decreed possession of the properties to the widow the plaintiff in that suit. In execution of the decree, she obtained possession and in 1897 she executed the registered deed of gift which the plaintiffs now seek to set aside.

The Subordinate Judge has held that the deed of gift is valid because the first defendant was entitled to a moiety of the properties in suit under a will executed by her husband a few days before his death by which he left a moiety of his properties to the first defendant and the other moiety to the 2nd defendant who is his brother's son.

The first contention raised in appeal is that the 2nd defendant is barred by the proceedings in that suit from relying on this will. The Sub-Judge is of opinion that there was no bar as 2nd defendant's guardian was guilty of gross negligence in defending that suit. The facts necessary for the decision of that question are these:—In that suit the widow alleged that her husband executed a will on the 8th May 1881, but a few days after the execution of the will he revoked it. The defence set up by the 2nd defendant's father in the Court of first instance was that the 2nd defendant had been adopted by the 1st defendant, that he was not aware of the execution of the will and that even if the will was genuine it was not valid against the 2nd defendant. The Munsif found that the adoption set up by the 2nd defendant's guardian was not proved. He also added that it was unnecessary to take any notice of the will as the evidence showed in his opinion that it was executed at a time when the testator was distressingly ill" *and as*

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both parties deny the will. He accordingly decided in favour of the 1st defendant.

In appeal the Judge held that the adoption was not proved. And as to the will, he observed "it is remarkable with what caution both parties approach Ex. A." The defendants deny its authenticity. But as a *pis aller* elect if the adoption is disallowed to profit by its provision to the extent of getting half the properties of the deceased for the minor 2nd defendant." He then considered the evidence in the case and found that the will was genuine and that it was revoked. The Sub-Judge is of opinion that the plea of adoption set up for the 2nd defendant in the former suit was false to the knowledge of his guardian and it was gross negligence on his part not to have relied on the will. I am of opinion that the Sub-Judge is right. There is no doubt from the evidence that the guardian who was the father of the minor must have known that the alleged adoption was false. Without his knowledge no such adoption could have taken place. The will was inconsistent with the adoption and he precluded himself from giving evidence about the genuineness of the will by setting up the false plea of adoption which he did no doubt to obtain the entire properties of the testator for his son who under the will would have obtained only half. The case before us then is that of a guardian who deliberately set up a false plea for adoption and fails to set up the claim of the minor under a will of which also he must have been aware. There is no doubt therefore that he was grossly negligent in the conduct of the suit. A minor is not bound by a decree passed against him if he shows that his guardian is guilty of gross negligence. I am of opinion therefore that the plea of *res judicata* cannot be upheld.

It is then urged that the widow was in possession of the property from 1883 to 1897 not as full owner claiming under the will but only setting up a widow's claim to the property. It is denied that the widow got possession in 1883 and it is alleged that she took possession only in 1887. This contention was not raised in the lower Court and as further evidence will have to be taken if the plea is now allowed to be urged we are not prepared to entertain it at this stage.

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Sankaran Nair, J.

It was also contended that the widow having disclaimed her rights under the will, it is not open to her now to claim the property as it became vested in the heir at law. This plea also was not raised in the lower Court and as further evidence has to be taken we cannot allow the appellant to raise it in appeal.

The next question is whether the will is genuine. It was produced with the plaint in the suit in 1882. It was proved in that case. It is also proved to be attested by the father of the 4th and 5th plaintiffs who was a witness in that suit. The karnam of the village who is an attesting witness has been examined in this suit and he proves that the testator executed of his own free will.

There is no evidence of the revocation of the will. It is true no doubt in the suit in 1881 it was found that the will was revoked. The evidence on which reliance was placed in that suit was of the father of the plaintiffs Nos. 4 and 5. That evidence is not of much weight as he was an attesting witness and was trying to get rid of the will. There is the oral evidence of the defendant's witnesses Nos. 3 and 4 which the Sub-Judge has believed, to show that the will is not revoked. We therefore disallow this contention.

For these reasons we confirm the decree of the lower Court and dismiss the appeal with costs.

Spencer J.:—While agreeing with the view taken by my learned brother that the 2nd defendant's father while acting as his next friend in O. S. No. 972 of 1882 was guilty of gross laches in basing his son's defence upon a false plea of adoption which he must necessarily have known to be not true, instead of relying upon the will which has now been found to be genuine. I am further inclined to agree with the Subordinate Judge that no case of *res judicata* can arise in this suit by reason of the previous litigation. My grounds are these. The widow was the plaintiff in the former suit and seeing that she and the 2nd defendant in this suit were then in competition for the right to succeed as heirs to the deceased Bapanna, the widow's cause of action appears to have been a personal one. But assuming for the sake of argument that she represented the estate of the deceased, it appears that the reversioners who are the plaintiffs in this suit, are neither claiming under her in the present litigation nor were represented by her in the former litigation. For the widow being

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still alive and appearing as 1st defendant in this suit must be treated as representative of the estate in this suit, if the estate is represented at all. As it stands to reason that an estate cannot be represented in one and the same suit, by two representatives, each with interests adverse to the other, it follows that while she lives the reversioners do not represent the estate when she does and therefore they are not bound by any decision obtained for or against her acting in her capacity as representative of the estate. Moreover in a suit to which no strangers are parties, each member of the family must ordinarily be considered to be litigating for his own benefit and not for the benefit of the estate. vide *Asghar Reza Khan* v. *Mahomed Mehdi Hossein Khan* [1].

On the other points arising in the appeal, I adopt the view taken in my learned brother's judgment and I agree that the appeal should be dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir John Edward Power, Wallis Offg. Chief Justice and Mr. Justice Seshagiri Iyer.

Chipurapalli Appayya ... *Defendant* * (*Appellant*)

v.

Sri Raja Kakarlapudi Ramachandra Raju Bahadur Garu and others ... *Plaintiffs and* (*Respondents*)

Chipurapalli Appayya v. Sri Raja Ramachendra Raju.

Estates Land Act S. 3.—Part of Estate—Owner of—Ejectment against tenant—Jurisdiction—Cognisable only by Revenue Courts.

The owner of a portion of an estate is a landholder within the meaning of the Estates Land Act whether the part was severed before the passing of the Act or after and suits by him for evicting tenants can be brought only in Revenue Courts.

Appeal from the decree of the Court of the Temporary Subordinate Judge of Vizagapatam in O. S. No. 69 of 1910.

Second appeal from the decree of the District Court of Vizagapatam in A. S. Nos. 162, 161 and 160 of 1911 respectively preferred against the decrees of the Court of the District Munsiff of Yellamanchilli in O. S. Nos. 654, 655 and 651 of 1909 respectively.

V. Ramdoss for Appellant.

B. N. Sarma, V. Ramesam and *G. Venkatramiah* for Respondents.

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1. (1903) I.L.R. 30 C. 556 (P.C.)

* Appeal No. 277 of 1911. S. A. Nos. 1508 to 1510 of 1912.

8th September 1914.

Chipurapalli Appayya v. Ramachendra Raju.

The Court delivered the following

Judgments.—*Wallis Offg. C. J*:—For the purposes of our decision the facts in A. S. No. 277 of 1911 and S. A. 1508 of 1912 may be considered to be the same. Both were suits in ejectment brought by the alienees of part of a village in the Uratla Estate, and the question is whether the jurisdiction of the Civil Courts is not barred under the provisions of the Madras Estates Land Act. The Uratla Estate is admittedly an estate within the meaning of the definition in S. 3 (2) of the Act, while the portion of a village alienated to the plaintiff does not itself form an estate within the meaning of the Act as it does not come within any of the descriptions in sub-clause (a) to (c). The District Munsiff and District Judge in the one case and the Subordinate Judge in the others are all agreed on this point, and are so far clearly right. They have however drawn the inference that because the land alienated to the plaintiff does not itself form an estate within the definition, it is outside the general scope of the Act, and the provisions barring the jurisdiction of the Civil Courts in suits for ejectment are inapplicable. This view is opposed to several unreported decisions of this court to which we have been referred, but as it has been held by all three Judges of the lower Court it may be as well to deal with the question on the merits. Though the plaintiff is not the owner of an estate is clearly the owner of part of an estate and as such a landholder within the definition of S. 3 (6); his tenants are ryots within the meaning of S. 3 (15) and pay rent within the meaning of S. 3 (11). As a landholder he may sue for ejectment before the Collector under S. 151, and the right of the Civil Court to entertain such suits is barred under S. 179. Nor, is there, as appears to have been imagined anything inconsistent with the scheme of the Act in holding that the plaintiffs are landholders as owning part of the Uratla Estate although the portion which they own has been absolutely severed from the rest of the estate and the proprietor of the latter has no interest in it. As appears from the title and the preamble the general scope of the Act is to declare and amend the law relating to the holding of land in estates in the Presidency, that is of course in estates as defined in the Act to the exclusion of the large areas such as ryotwari tracts which do not come within the definition. Again, even in estates, the general provisions of

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Wallis, C.J.

the Act are only applicable as between landholders and ryots as defined in the Act and do not apply to the relations between ryots in estates and those holding under them, except of course as expressly mentioned. In this state of things the Legislature was faced with the question whether estates as defined in the section which had become divided in ownership without being split into two or more estates should as between the several owners and the ryots under them be regulated by the general provisions of the Act and it seems to me there were obvious reasons for so including them by providing that landholder should include a person owning part of an estate, that is of an area to which the general provisions of the Act were intended to apply. In any case the provisions of the Act are plain in my opinion and we are bound to give effect to them. The appeal and the second appeals are allowed and the decrees set aside, all the plaints will be returned for presentation to the proper Court. Costs to abide the result.

Seshagiri Iyer, J.:—The plaintiff sues to eject the defendants from certain lands in the village of Mallavaram. It is conceded that geographically these lands are within Uratla, a permanently settled estate: it is also not disputed that they belonged originally to the proprietors of Uratla Estate: they were given to one Subadriah Garu in exchange for certain maniam lands situated elsewhere. The plaintiff purchased these lands from the son of Subadriah Garu: his allegation is that the defendant has no occupancy right in these lands and that he is entitled to eject him. The defendant demurs to the jurisdiction of the Civil Court; he pleads that he is an occupancy ryot and is entitled to remain in possession. The learned District Judge held that he had jurisdiction to entertain the suit; and holding that defendant was liable to be evicted, gave a decree to the plaintiff. The defendant has appealed.

I am of opinion that the Civil Courts have no jurisdiction. It is admitted that the lands in suit were originally ryoti lands, and the evidence is clear and uncontradicted that at the time of the exchange they continued to be ryoti, It is not necessary for the purpose of deciding the question of jurisdiction to determine whether both the warams vested in Subadriah Garu or only the melwaram: I do not think that the fact that the exchanged lands were inams has any bearing upon the question

we have to decide. Our opinion in regard to them must depend upon their own character and not upon that of the property for which they were substituted.

The learned District Judge based his judgment mainly on the ground that Mallavarm is not an estate as defined in S. 3 (2) of the Estates Lands Act and consequently the provisions of the Act do not apply to lands in that village; I am unable to agree with this veiw; it is clear that the Act was not intended to be confined in its operation only to estates in their entirety which fell under one of the five clauses of S. 3 (2): I do not think it is open to us to attribute an intention to the legislature which is inconsistent with the operative portions of the Act. S. 200 of the Act makes it clear that parts of an estate are within the Act: on principle, it seems clear that all lands in a permanently settled estate are to have the benefit of the Act, and the fact that a portion of the estate has been granted to a stranger should not make any difference in this behalf. In S. A. 1218 of 1911 it was held that the definition of estate is not the governing factor in deciding the applicability of the Act.. I am of the same opinion. Mr. Sarma's chief contention is that the word *estate* used in clauses 2, 5, 15 and 16 of S. 3 refers to one as it existed at the time of the Estates Land Act and not to one with limits ascribed to it at the time of the permanent settlement. As a corollary from this, he argues that portions of the parent estate which either by operation of law or by act of parties ceased to belong to the permanently settled estate are not within the ambit of the Act. No authority has been quoted for this proposition nor can such a contention be upheld even on grounds of expediency. As a matter of fact, portions of estates granted subsequent to the permanent settlement are included for revenue purposes within the estate. Their liability to be attached for arrears of revenue continues and unless separated and separately registered, the lands continue to be part of the estate: the definition of *landholder* (S. 3, cl. 5) places the matter beyond doubt. There can be more than one landholder within an *estate* and each will have all the powers given to that class by the Act. I feel no doubt that Mallavaram is within the Uratla Estate; even though the proprietor of

Chipurapalli Appayya v. Ramachendra Raju. — Seshagiri Aiyar, J.

that estate is not the landholder in respect of the village, and that the plaintiff is a landholder. I have already held that the land in suit was ryoti land, and it follows from the above that the defendant is a *ryot*. I am not deciding whether he has got occupancy right in the land. He has put forward that claim and it is upon that assumption that the question of jurisdiction has to be determined. From my findings about the nature of the land, and the characters of the plaintiff and the defendant, S. 151 of the Estates Land Act applies to the case; and under article 17 of the schedule only Revenue Courts have jurisdiction. This conclusion of mine is in accordance with the decisions in Second Appeals 168 of 1912, 323 of 1913 and *Brundavan Chandra Harischandra Raja* v. *Ramayya* [1]: I agree that the appeal should be allowed and that the plaint should be returned to the plaintiff for presentation to the proper Court. In the Second Appeals also, the plaint will be returned for presentation to the proper court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

Ramakrishnama Chetty ... *Appellant** (*Defendant*)

v.

Vuvvati Chengu Aiyar and others ... *Respondents.*

Ramakrishnama Chetty v. Vuvvati Chengu Aiyar

Transfer of Property Act, S. 68 (b)—*Applicability to charge—S. 100—Statute —Interpretation—Application of S.* 68 (b) *to mortgagor's heir.*

Having regard to S. 100 Transfer of Property Act, the provisions of S. 68 of the Act as to the liability of a mortgagor who commits waste equally apply to persons creating a charge.

A provision in a statute which gives a right or imposes a liability on a person must be deemed to confer that right and impose that liability on that person's legal representative and if it confers that right or imposes the liability on that person as the owner of a certain property, such right or liability is conferred or imposed on the assignee of the property unless the reason of the rule of law cannot clearly apply to anybody but the original owner of the property or the original obligor.

Held, accordingly that the heir also is liable to pay the mortgage money under S. 68 (b) of the Transfer of Property Act when he commits waste to the prejudice of the security.

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* S. A. No. 877 of 1912. 27th July 1914.

1. (1914) 26 M. L. J. 600.

Ramakrishnama Chetty v. Vuvvati Chengu Aiyar

Second appeal from the decree of the Subordinate Judge of North Arcot in A. S. No. 92 of 1911 preferred against the decree of the Court of the District Munsif of Tirupati in O. S. No. 255 of 1909.

Suit on a document purporting to be a mortgage with a condition that the profits are to be spent for the purposes of a religious endowment. The appellant in the High Court and the Lower Appellate Court is the 5th defendant who was a purchaser of the equity of redemption at a rent sale. The appellant had cut and carried away trees on the mortgaged property for the value of which he is sought to be made liable. Before suit the property had passed from his hands. Both the Courts below decreed plaintiffs' claim against the appellant.

T. Narasimha Aiyangar for Appellant.

S. Srinivasa Aiyangar for Respondents.

The Court delivered the following

Judgment :—We have no doubt on a construction of Exhibit A that it is a deed of mortgage as it expressly says in several places that it is executed as a mortgage of certain immoveable property and the profits of the properties are to be spent for the expenses of the mortgagee which is a religious endowment of which the plaintiffs are constituted trustees under that document. See also *Venkatrama Aiyar* v. *Suppa Nadan and others* [1].

The arguments of the appellants (5th defendant's) learned Vakil which are based on the construction that Exhibit A is not a deed of mortgage and hence that the provisions of S. 68 cl. (*b*) of the Transfer of Property Act do not apply need not be further considered though we might add that we are not prepared to accept the argument of the learned Vakil that in the case of a mere charge as distinguished from a mortgage the provisions of S. 68 as to the liability of a mortgagor who commits was he do not apply to the person creating a mere charge notwithstanding the very wide words of S. 100 of the Transfer of Property Act.

The only other contention on the Appellant's side is that S. 68 (*b*) of the Transfer of Property Act makes only the "mortgagor" liable personally for the mortgage money when

1. (1914) M. W. N. 501.

Ramakrishnama Chetty v. Vuvvati Chengu Aiyar

he commits a wrongful act or default to the prejudice of the security. In other words the contention is that the heir or the assignee of the equity of redemption is not intended by the section to be made liable personally for the mortgage money even when he himself is personally responsible for the waste. In the first place even without a special legislative provision, every person whether the mortgagor or a stranger who commits waste to the detriment of the security of the mortgagee is liable under the general law to the mortgagee for damages to the extent of the damages of the security (*Aiyappa Reddi* v. *Kuppusami Reddi* 1,) and S. 68 (*b*) merely extends the rights of the mortgagee if the wrongdoer is the mortgagor to the length of enabling the mortgagee, not only to sue for the exact amount of the damages caused but for the whole of the mortgage money itself.

In the next place a provision in a statute which gives a right to or imposes a liability on a person must be deemed to confer that right and impose that liability on the person's legal representative and if it confers that right or imposes the liability on that person as the owner of a certain property such right or liability is conferred or imposed on the assignee of such ownership right unless the reason of the rule of law cannot clearly apply to anybody but the original owner of the property or the original obligor.

There is not only no reason why the original mortgagor alone should be made liable by reason of the waste and not his representative or a purchaser of his right who is directly responsible for the waste committed the reason of the rule applies to them also as much as to the original mortgagor. The fifth defendant who purchased the equity of redemption in a rent sale and committed waste is therefore clearly liable to the plaintiffs (mortgagees) by reason of waste committed by him in any view of the case and this second appeal is therefore dismissed with costs.

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1. (1914) I. L. R., 28 M. 208.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Seshagiri Aiyar and Mr. Justice Kumarasami Sastri.

Muthukaruppan Samban and others ... *Defendants* *
v. (*Appellants*)
Muthu Samban ... *Plaintiff*
(*Respondent.*)

Muthukaruppan Samban *v.* Muthu Samban.

Transfer of Property Act Ss. 4,54—Immoveable property of the value of less than Rs. 100—Oral sale—Vendee in possession—Effect of—Unregistered sale deed—No prior oral sale pleaded—Ineffectual to pass title—Evidence of adverse possession—Admissibility as—Registration Act S. 49.

An oral sale of immoveable property of the value of less than Rs. 100 already in the possession of the vendee will be upheld if it is shown that the vendor has by appropriate acts or declarations converted the possession of the mortgagee into one as a purchaser.

But where a sale was set up as having been effected by an unregistered sale deed accompanied by delivery of possession and no prior oral sale was pleaded.

Held having regard to S. 54 of the Transfer of Property Act, the unregistered deed could convey no title.

Held also : that the combined effect of Ss. 4 and 54 of the Transfer of Property Act read with S. 49 of the Registration Act was to prevent the deed from being given as evidence of adverse possession as purchaser.

Second appeal from the decree of the District Court of Madura in A. S. No. 163 of 1912 preferred against the decree of the Court of the District Munsiff of Tirumangalam in O. S. No. 92 of 1912.

G. S. Ramachandra Aiyer for Appellant.

K. Jaganatha Aiyer for Respondents.

The Court delivered the following

Judgment :—Defendants 1 to 5 are the appellants. The plaintiff as the purchaser from one Alagar Samban sued to redeem an usufructuary mortgage dated 8th December 1837 executed by Alagar Samban in favour of the 1st defendant. Defendants 1 to 5 plead a sale by Alagar Samban to the 1st defendant by an unregistered sale deed dated 6th April 1898 and state that they have been in possession as owners ever since that date and that the plaintiff's suit is barred by limitation. The District Munsiff held that the plaintiff was aware of the sale deed in favour of the defendants and the defendant's possession thereunder and that he was not entitled to redeem on the strength of the sale deed. He held in effect that though the

* S. A. No. 2349 of 1913. 28th August 1914.

Muthu-karuppan Samban v. Muthu Samban.

plaintiff's deed was registered, and that of the defendant's unregistered, the plaintiff was entitled to no priority as he purchased with notice of the defendant's title. The District Judge on appeal reversed the decision of the District Munsif on the ground that, as the defendants were already in possession as mortgagees at the date of the sale deed (Exhibit II) and no fresh possession was given to them, they acquired no title under S. 54 of the Transfer of Property Act. He also held that a mere assertion of title under an invalid sale deed cannot create prescriptive rights. He was of opinion that it was not shewn that the plaintiff had notice of the defendants' unregistered sale deed when he purchased the property. It is contended for the appellants that the view taken by the District Judge is erroneous and that the fact the defendants were already in possession will not render the sale to them invalid. The District Judge relied on *Sibendrapada Banerjee* v. *Secretary of State for India in Council*[1] and was of opinion that the oral sale, even if true, was invalid as the vendee was already in possession of the properties at the time of the oral sale. We are unable to see why an oral sale with a request by the vendor to the vendee to remain in possession in the capacity of vendee and with absolute rights should not be sufficient to pass title without recourse to the expedient of the vendee quitting the property one moment and entering upon it at another. An arrangement by which the legal nature and character of the previous possession is put an end to and subsequent possession treated as one by the vendee with absolute title is, in our opinion, sufficient to satisfy the requirements of S. 54 of the Transfer of Property Act. In *Kannan* v. *Krishnan* [2] it was held that possession under a mortgage which was followed by an agreement to sell was equivalent to delivery of possession so as to satisfy the requirements of S. 48 of the Registration Act. In *Palani* v. *Selambara* [3], it was held that an attornment by tenants was sufficient delivery of possession to satisfy the requirements of S. 48 of the Registration Act. In the 13 *Madras* case above referred to Handley J. was of opinion that the same principle was extended to cases where possession is already with the purchaser and he retains it under the agreement to sell. So far as the delivery of possession is concerned, there seems to

1. (1907) I.L.R. 34 C. 207. 2. (1889) I. L. R. 13 M. 324.
3. (1885) I. L. R. 9 M. 267.

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be no difference between the provisions of S. 48 of the Registration Act and those of S. 54 of the Transfer of Property Act. S. 48 of the Registration Act requires an agreement or declaration to be accompanied or followed by delivery of possession and S. 54 of the Transfer of Property Act requires delivery of the property such delivery being by putting the purchaser in possession of the property. In *Bai Kushal* v. *Lakhma Mane* [1], it was held that where one of several donees was in physical possession a declaration by the donor to the donee in occupation that he has parted with the possession is sufficient to validate the gift.

Unless there is something in S. 54 of the Transfer of Property Act which compels us to do so, there is no reason for putting on this section a construction that would in effect require sales of properties below Rs. 100 to be only by registered instruments in the numerous classes of cases where the vendee is already in possession as tenant or mortgagee. With due deference to the learned Judges who decided *Sibendrapadi Banerjee* v. *Secretary of State for India in Council* [2], we are unable to accept that case as a correct exposition of the provisions of S. 54 of the Transfer of Property Act. The conclusion we have come to is that, if there was an oral sale of the properties, the fact that the vendee was already in possession would not render the sale invalid if the vendor had by appropriate declarations or acts converted the position of the vendee as mortgagee into one as purchaser. The difficulty in the present case, however, arises from the fact that no oral sale has been pleaded; on the contrary the case for the defendants has been that there was an unregistered document evidencing the sale which was acccompanied by delivery of pessession. No issue was raised as to any oral sale having preceded Ex. II, but issues 1 and 2 are framed on the footing that the defendants' title is based on a deed of sale coupled with delivery of possession. Under these circumstances we do not think that it is open to the appellants to set up an oral sale as to which there was no issue or any evidence.

The position, therefore, is that the sale deed relied upon by the defendants is invalid for want of registration as S. 54 of the Transfer Property Act requires all sale deeds if in writing,

1. (1883) I. L. R. 7 B 452. 2. (1907) I. L R. 34 C 207.

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to be registered. S. 4 of the Transfer of Property Act provides that S. 54 of the Act shall be read as supplemental to the Registration Act. The effect, therefore, of S. 4 read with S. 54 of the Transfer of Property Act is to make all sale deeds compulsorily registrable irrespective of the value of the property. There is, therefore in this case no competition between a document which is optionally registrable and a registered document. The competition is between an invalid and a valid sale deed. It is argued by the appellant's vakil that, as the defendants had possession for 12 years before the suit, they acquired title by prescription and that even assuming that the sale deed in their favour was invalid, it must be taken that their possession was an assertion of absolute title as vendees. The difficulty in accepting this contention of the appellant's vakil is that as the sale deed (Ex. II) is required by law to be registered, it is not admissible in evidence even for the purpose of showing the nature of the appellant's possession. In *K. Subbayya* v. *K. Maddulatiah* [1] it was held that an unregistered document is inadmissible to prove the nature of the possession of the person claiming under it. So far as this Presidency is concerned the balance of authority is for holding that the establishment of title by adverse possession is a transaction affecting immoveable property. If the defendant's sale deed cannot be looked into for the purpose of determining the nature of their possession, there are no materials for holding that their admitted previous possession as mortgagees was altered or that they acquired by prescription absolute title as purchasers.

The second appeal fails and is dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Sir Edward Power Wallis Kt. Officiating Chief Justice and Mr. Justice Seshagiri Aiyar.

The South Indian Industrials Limited formerly known as the Arbuthnot's Industrials ... *Appellants* * (*Plaintiffs*)

v.

Mindi Rama Jogi and others ... *Respondents* (*Defendants 1 and 3 to 5*).

The South Indian Industrials Ld. *v.* Mindi Rama Jogi.

Principal and agent—Contract Act. Ss. 195, 226, 230—*Parol evidence to show party to be only agent—Admissibility of—Exclusive credit given to agent—Effect of—Maintainability of suit by principal—Special agreement excluding right to sue—Dubash—Position of—Sub-agent—Equitable set off.*

The defendants were Dubashes under the late Arbuthnot and Co., and had deposited Rs. 50,000 as security for the due performance of contracts entered into through them. Under the contract of agency, defendants had bound themselves not to transact business for any firm other than the Arbuthnots. The Arbuthnots transferred the business in connection with which the defendants were mainly operating, to the present plaintiffs. Nevertheless as they were the managing agents of the plaintiffs, the transactions were carried on as before without any change in the wording of the contracts between them and the defendants.

Held, Per Officiating Chief Justice :—that the proper inference from the facts was either that the defendants were only sub-agents with whom the plaintiffs had no privity of contract or that though the Arbuthnot and Co. acted as agents of the plaintiffs, there was special agreement between the parties disentitling the plaintiffs from suing upon the contract and in either view, plaintiffs were not entitled to maintain an action upon the contracts entered into by the Arbuthnots with the defendants, but that if the plaintiffs could sue upon the contracts, the defendants being aware that the Arbuthnots were acting as plaintiffs' agents and for their benefit were not entitled to plead that the amount of their deposits should be equitably set off against the suit liability.

Per Seshagiri Aiyar J : that the Arbuthnots and defendants were contracting as independent parties and as such the plaintiffs could not sue them but even if they could, defendants being unaware of the terms of the contract between the plaintiffs and the Arbuthnots they could do so only subject to equities *viz.*, the duty to give credit for the 50,000 Rs. deposited with the Arbuthnots.

Per Officiating Chief Justice : Parol evidence is not admissible to show that a person who has signed a contract in his own name acted only as agent and therefore could not sue or be sued upon it.

Per Seshagiri Aiyar J : The question whether one of the contracting parties was acting for himself or on behalf of his principal does not relate to the terms of the contract.

* A. S. 254 of 1911. 17th September 1914.

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Per Officiating Chief Justice: Whereas under the English Law, the fact that exclusive credit was given to the agent is a defence to the action by the principal, under S. 226 the principal would be entitled to sue in the absence of a special agreement disentitling him to sue. Such an agreement can be proved notwithstanding the absence of the words "in the absence of a contract to the contrary" in that section.

Per Seshagiri Aiyar J: *Prima facie*, a contract by a person in his own name without more is a contract by him as principal and a stranger cannot enforce it. There is nothing in S. 230 of the Indian Contract Act which makes a departure from the English Law. That section is not exhaustive of the rules of evidence.

Position of *Dubashes* generally considered.

Appeal from the decree of the Court of the Temporary Subordinate Judge of Vizagapatam in O. S. No. 34 of 1909.

T. Richmond for the Appellants.

S. Srinivasa Iyengar with *V. Ramesam* for the Respondents.

The Court delivered the following

Judgments:—*The Officiating Chief Justice.* It will be convenient in the first place to state briefly the facts which have given rise to this litigation. Messrs. Arbuthnot & Co., herein after referred to as the firm, carried on business for a great many years in Madras as Bankers and General Merchants until they were adjudicated insolvents on their own petition in October 1906. The firm for many years had an agency at Bimilipatam, and according to the usual method of business made their purchases from local traders there through dubashes who guaranteed the transactions for a commission and gave security for the guarantee. The defendant's family had been the firm's dubashes at Masulipatam for many years and so continued until the failure. Purchases were made through them of other produce besides jute such as indigo and gingelly seeds but of late years nearly all the purchases were of Jute to be used in the Jute Mill at Chittivalasa.

The conditions of business between the firm and the dubashes were governed by written agreements, which were renewed from time to time in consequence of changes in the dubashes' family, see Ex. II, dated 23-2-03 and Ex. I dated 11-3-05 which was in force at the date of the failure. Under these agreements the dubashes were prohibited from transacting business as agents or dubashes for any other firm except Arbuthnot & Co. They were to guarantee delivery of all goods contracted for through them, and pay 12½% of the value of the goods as liquidated damages for non-delivery, they were also to guarantee the repayment of

advances made by the firm to themselves or through them to local dealers, advances which are incidental to the sort of business. As security for the due performance of the terms and the conditions of the agreement and for the due performance of all present and future transactions between the dubashes and the firm "including the purchase by the dubashes of gunny bags or other merchandise" it was recited that the dubashes had deposited fifty thousand rupees with the firm which was to carry interest at 5 per cent.; in other words the defendants were to keep Rs. 50,000 on fixed deposit in the firm's bank as security for the liabilities they might incur, as the firm's dubashes. In the last clause it was provided that the agreement was intended to operate, as an agreement between the dubashes and the firm of Arbuthnot & Co. whether it should continue as then constituted, or consist of other persons. The special provision that the security should be for the due performance of all transactions including the purchase of gunny bags or other merchandise shows clearly that it was intended that business connected with the Chittivalasa Mill was to be done under this agreement, One of these agreements between the firm and the dubashes Ex. II was entered into after the Chittivalasa Mill had been transferred to a limited company, the Chittivalasa Spinning and Weaving Company Limited owned by the firm, and the other (Ex. I) after that company had sold the mill to the present plaintiff's company, brought into existence in October 1906 to take over the industrial undertaking carried on by the firm. The firms were the managing Agents of both these companies and it may be added though it is not perhaps very material, that the firm had a very large interest in the Industrials as may be gathered from the order made by the Insolvency court Ex. 16 (*a*) and also from the allusion in the plaintiff's evidence to the sale of the Industrials by the Official Assignee.

In the present suit the plaintiff company sues as principals to recover from the defendants the firm's dubashes the amount of the defendant's indebtedness at the date of the firm's failure on contracts entered into with the firm in respect of the Chittivalasa Mill which contracts it is alleged were made by the firm as agents of the plaintiff Company. The main defences raised were that the defendants had never contracted with the plaintiff company; that they were unaware before the failure that the firm in these transactions were acting for the plaintiff company and were

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entitled to set off against the plaintiff's claim the greater sum of Rs. 50,000 deposited by them with the firm under Ex. 1 and that in any event in the circumstances of the case the plaintiff company should be allowed to sue the defendants without giving credit for Rs. 50,000 which the defendants had deposited with the firm as security for the performance of these as well as other transactions with the firm. The Subordinate Judge in a very lengthy judgment has upheld the last contention and has dismissed the plaintiff's suit.

It may be said at once that the defendant's contention that they did not know the firm were acting as agents of the plaintiff company in the suit transactions until after the failure in October 1906 is demonstrably false and is so found by the Subordinate Judge. The defendants from their intimate acquaintance with the affairs of the Mill must have known of its transfer to the Chittivalasa Spinning and Weaving Company, and also of its subsequent transfer by the latter to the plaintiff company; and their correspondence with the plaintiff company and the firm soon after the plaintiff company came into existence. Ex. I. series proves conclusively that they did. The plaintiff Company which was registered in January 1905 was to take over from 1st October 1904. The defendants were responsible for short deliveries on that year's contracts and applied to the firm that they might be allowed to complete these deliveries in the coming year, Ex. 12 dated 26th January 1905. From Ex. I, dated 10th February 1905, a letter from the firm's Bimilipatam Agent to the firm as managing agents of Arbuthnot's Industrials, Madras, it may be gathered that the firm had passed on L 2 to themselves as managing agents of the Industrials and that as managing Agents of the Industrials they sent a reply addressed to the defendants dated the 3rd February which was handed to them by the firm's Bimilipatam Agent. It is significant that the defendants do not produce this letter of the 3rd from the Industrials to themselves, but we have their answer to it Ex. L, dated 10th February 1905 addressed. "The Managing Agents, Arbuthnot's Industrials Ltd." in which they thank the Industrials for allowing them to deliver in next November and December "the unfulfilled portion of Contracts of jute of the present crops." This is the clearest proof that they knew that the firm was acting in these jute transactions as the Agents of the Industrials

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and indeed, as already observed, they could not have been unaware of it. Nonetheless all along down to the date of the firm's failure the contracts with the defendants for the sale and purchase of jute and advances were made in the name of the firm, and the defendant's account appears in the account books of the firm, and with the exception of Ex. L, the defendants are not shown to have directly corresponded with the firm, though the correspondence between the firm and the Industrials goes to show that communications may have passed verbally through the firm's Agent at Masulipatam. The appellants' case was that in these transactions the firm acted as agents for the plaintiff company to the knowledge of the defendants, and were therefore dis-entitled to avail themselves of the defence of set off or any other equitable defence under S. 226 of the Contract Act. This of course assumes that in these transactions with the defendants the firm were acting as agents for the plaintiff company and not as principals.

Assuming that the firms are to be considered as having acted as Agents for the plaintiffs in their dealings with the defendants, which seems to have been the view taken in the Lower Court, still having entered into these contracts in writing in their own name, and without mentioning their Agency, they could sue and be sued upon by them because, as ruled in *Higgins* v. *Senior* [1], to hold otherwise would be to vary the terms of the written contract.

Secondly, it seems clear that in such a suit on these contracts by the firm against the defendants, the defendants would have been entitled to rely on the 50,000 Rs. deposited by them with the firm as bankers to secure their performance of these and other contracts with the firm, as the amount of the deposit is largely in excess of the sum sued for and there are no other claims against it on the part of the firm. Where the Agent enters into a written contract in his own name there is a contract enabling him to sue and be sued on it within the meaning of S. 230 of the Indian Contract Act.

None the less of course, the plaintiff Company as Principals would ordinarily be entitled under S. 226 to sue on Contracts and

1. (1841) 8 M. and W. 834.

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entered into by the firm as their agents in the same way as if the contracts had been entered into by the plaintiff company itself and if the defendants neither knew nor had reasonable ground for suspecting that in the contracts sued on, the firm had been acting as agents, the plaintiff Company could only have succeeded, subject to the rights and obligations subsisting between the firm and the defendants, and in the circumstances of the case the latter would in my opinion have been entitled to set up their claim to the Rs. 50,000, by way of equitable set off.

But, as already stated it is clearly proved that the defendants well knew of the relations between the firm and the plaintiff company and if so, they (defendants) are not entitled to rely on such a defence. The Subordinate Judge has held I think rightly with reference to this section that the defendants are not entitled to set off their claim against the firm the Agent, but has held further the deposit of Rs. 50,000 by the defendants with the firm as security for the performance of this and other contracts with the firm creates an equity in favour of the defendants which justifies the dismissal of the suit. That would be so, if S. 232 applied, but as I have held, it has no application, seeing that the defendants knew of the relations between the firm and the plaintiff company and in these circumstances it seems to me that the defendants are not entitled in a suit by the plaintiff company as principals to rely on any defence resting on the rights and obligations subsisting between the firm (the agent) and the defendants, whether the defence be set off or any other equity.

For these reasons I am unable to uphold the action of the Subordinate Judge in dismissing the suit on the ground of an equity subsisting between the plaintiff's agents, that is to say the firm and the defendants.

Mr. S. Srinivasa Aiyangar has however contended that in this case the plaintiff Company have no right to sue at all as the transactions which gave rise to the suit were intended to be exclusively between the firm and the defendants. Such a defence would undoubtedly be available if proved in English Law. In Story on Agency art. 413 it is observed "Another exception is where an exclusive credit is given to and by the Agent; and,

therefore, the principal cannot be treated as in any way a party to the contract, although he may have authorized it or may be entitled to the benefit of it." And in the *Montgomerie's case* [1]. Wright J. laid down and applied the same rule. " In all cases the parties can by their express contract provide that the Agent shall be the person liable either concurrently with or to the exclusion of the principal, or that the Agent shall be the party to sue either concurrently with or to the exclusion of the principal." See also *Nevill's case* [2] and *Leslie's case* [3].

Under the Indian Contract Act the Principal's right to enforce a contract entered into by his Agent rests on S. 226, which does not contain the words "in the absence of a contract to the contrary" which are to be found in S. 230, negativing the Agent's right to sue and be sued in the absence of a contract to the contrary. Even so, I am not prepared to hold that a Principal might not contract himself out of his right to sue on the contract under S. 226 on the principle *unique licet remuntiara Juri prosee introducto* their being no provision against contracting out. It would of course be necessary to prove such an agreement unless the relation of the defendants, to the firm was that of sub-agents in which case there would clearly be no privity between the plaintiff company and the defendants. See S. 192 of the Indian Contract Act.

Putting aside the question of sub-agency for the moment, I think the evidence on record is sufficient to prove an agreement disentitling the plaintiffs to sue of the kind referred to in Mr. Bowstead's Digest of the Law of Agency, article 90.

It is admitted by Mr. O. Hearar the plaintiff's only witness and abundantly proved by the documents exhibited that business between the firm and the Dubashes went on in exactly the same after the creation of the Chittivalasa and Industrial Companies as before. The suit contracts for the purchase of Jute, A series, and the sale of gunnies E series were in turn between the defendants and the firm. K. series are delivery orders of gunny bags to the defendants by the firm's Agents. According to the evidence of witnesses the firm's Agent was not asked to change the mode

1. (1891) 1 Q. B. 370 at 372.
2. (1887) 19 Q. B. D. 110.
3. (1887) 22 Q. B. D. 722.

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of correspondence or make any change in the modes of dealing after the Industrials were opened. Exhibits IV and VI series are contracts between the firm's agent and the defendants. Exhibit V dated 10-1-03 during the time of the Chittivalasa Company is from the firm's agent to the defendants "enclosing your Jute account with Messrs. Arbuthnot and Co." Exhibit VIII dated 23rd July 1906 is from the firm's agent to the Defendants enclosing a memo of gunnies purchased for them and of their commission as to which reference is made to the firm's letter dated 7th December 1894. Exhibit IX series are orders for gunnies between the firm's agent and the defendants. X series are the gunny contracts and XI series the receipts by the firm's agent for the price of the gunnies and XII series are delivery orders issued by the firm's agents to the defendants.

Formerly therefore the suit contracts the accounts and the correspondence were all along between the firm and the defendants and the formation of the Chittivalasa and the plaintiff companies made no difference at all.

Then as to matters of substance it is perfectly clear that the suit contracts were intended to come under the provisions of the agreement between the firms and the defendants Exhibit I, which was entered into in removal of former contracts at a time when the plaintiff company had come into existence just as the earlier agreement in the same terms. Exhibit II was entered into between the same parties in the time of the Chittivalasa Spinning and Weaving Company.

Secondly, it is clear that these agreements Exhibits I and II were entered into by the firm as principals because they cover other business of the firm with which the plaintiff company was not concerned. These contracts expressly stipulate at the contract, that the defendants were not to transact business either as agents for or Dubashes of any individual or firm other than the firm of Messrs. Arbuthnot and Co. and of this the plaintiff company were aware as Messrs. Arbuthnot and Co. were their managing Agents. Further in all the documents the defendants are addressed as Messrs. Arbuthnot and Co. as Dubashes.

On the above facts it seems to me that the reasonable inference is that the suit dealings of the Dubashes were intended

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to be with their firm exclusively in accordance with Exhibit I and I, may further refer to Exhibit IV filed by the plaintiffs dated 24th May 1900, in which the defendants say that "they were tied hand and foot and prevented from having any sort of dealing with any other firm." I do not think the fact formed by Exhibit E series that the defendants knew the firm were the Agents of the Plaintiff company and that in one instance LI they answered a letter addressed to them by the plaintiff company and the fact that the terms of the contract were settled in correspondence with the firm's agent at Bimilipatam and the plaintiff company (Exhibit J series) even if brought home to the defendants are sufficient evidence to show that they intended to depart from the terms of Exhibit I and deal with any one but the firm of Arbuthnot & Co.

It seems to me however that the right view of the case on the above facts is that the defendants were the sub-agents of the firm of Arbuthnot & Co. who were the Agents of the Plaintiff Company and that under S. 192 of the Indian Contract Act and the decisions there was no privity between the Plaintiff Company and the defendants and that on this ground the present suit should have been dismissed. In all these transactions the defendants acted and were addressed as Messrs. Arbuthnot & Co. Dubashes, that is to say, as intermediaries between the firm and local dealers and guarantors of the firm's transactions.

The position of Dubashes in this part of India is much the same as that of Banians in Northern India which was considered in *Peacock* v. *Baijnath* [1], by Wilson and Cunningham JJ. in a passage of their Judgment at p. 586 which was subsequently approved by the Privy Council on appeal.

The observations of *Sir Lawrence Peel* in *Orr Ewing's case* [2], that a Banian is a sub-agent of a peculiar kind was quoted with approval and the learned Judges observed ; "This case is really much stronger than the many cases in England in which it has been held that no privity existed between the foreign Principals and English Sub-agents, such as the *New Zealand and Australian Land Company* v. *Watson* [3], and *Kaltenback* v. *Lewis* [4], because the Banian is in the permanent

1. (1891) I L R. 18 C. 573. 2. (1853) Bowl. 534.
3. (1881) L. R. 7 Q. B. D. 374. 4. (1885) 10 A. C. 627.

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employment of the Calcutta firm." Here it may be added that such employment of the defendants by the firm was not only permanent but conclusive.

The conclusion I have come to is that the defendants acted as the Sub-Agents of Arbuthnot & Co., who were the managing agents of the plaintiff company that there was no privity between the plaintiff and the defendants and that both on this ground and on the ground already stated the present suit fails,—and the appeal must be dismissed with costs.

The memorandum of objections is dismissed.

Seshagiri Iyer, J:—I entirely agree with the conclusion at which the learned Chief Justice has arrived. The questions involved are of some importance, I shall state my own reasons for the conclusion.

The late firm of Arbuthnot & Co. had a gunny factory at Chittivalasa. They had also a spinning and weaving mill there. The defendants and their father were the agents and dubashes of the Company since 1890. A sum of Rs. 50,000 was deposited by them with the Company in fixed deposit as security for the due performance of their duties as agents and dubashes. This deposit was being renewed from time to time. It remained with the Company until their insolvency in 1906. These facts are not disputed.

In January 1905, Arbuthnot & Co. converted the business in Chittivalasa into a limited Company known as Arbuthnot's Industrials. Plaintiffs are the successors in title of this new Company. It is in evidence that this new Company was worked by Arbuthnot & Co., as managing agents. I do not think this fact admits of any doubt. I am also satisfied that the defendants were aware of the starting of the Industrials. Exhibits L and LI are clear on this point. I do not think, however, these documents establish that the defendants undertook to transact their business in future with the new Company. It is true that they received a letter from the Industrials informing them of the extension of time for performance of their contract, and they addressed their reply to them; but I am not satisfied that this communication fixes them with an undertaking to deal thenceforward with the new Company. In the view that I have taken of the subsequent contract, this

may not be material; but I think it right to state my conclusion upon the contention raised by Mr. Richmond that, it is proved by Exhibit L1 that the defendants accepted the plaintiffs predecessor-in-title in the place of Arbuthnot & Co.

Exhibit L1 was in February 1905. On the 11th of March 1905, Arbuthnot & Co., entered into a new agreement with the defendants (Exhibit I). The object of this agreement was much commented upon at the bar on both sides and as my decision rests to a great extent upon the view I take of it I shall deal with it in some detail. Mr. Richmond says that this agreement was not entered into by Arbuthnot & Co., as managing agents of the Industrials. I think he is right. At the same time, I feel no doubt that it was under this agreement that jute was supplied by the defendants and that gunny bags were purchased by them. Paragraph 2 of the agreement refers to "the due delivery of all goods contracted for." This includes contracts for the supply of jute. It is not pretended that the defendants contracted to deliver jute to Arbuthnot & Co., prior to the formation of the Industrials under any other contract. The previous contracts renewed by Exhibit I contained the same terms. There is no force in the contention of the learned counsel for the appellant that the contract to supply jute was *dehors* this instrument. Clause 7 of Exhibit I refers to the purchase of gunny bags. Clause 6 provides for the deficit due from the defendants being met from the security amount. Thus it is clear that after the floating of the Industrials and after Exhibit L1, defendants contracted with Arbuthnot & Co., not as agents of the Industrials, but admittedy as principals to supply jute to them to purchase gunny bags from them and to the deposit of Rs. 50,000 being held as security for the due performance of these contracts. It is not alleged or proved that these defendants supplied to Arbuthnot & Co., any jute or purchased bags other than those relating to the subject matter of this suit. *Prima facie* therefore, the plaint transactions were with Arbuthnot & Co., as principals. One very good reason why Arbuthnot & Co., dealt with the defendants in their own name is, otherwise they would have had to refund the deposit amount.

It has been argued that the contiacts sued for were under Exhibits A and E series which have no reference to Exhibit I.

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The language of these A and E series contracts does not hold the appellant. They are entered into by the defendants as Dubashes and Agents of Arbuthnot & Co., with Arbuthnot & Co., without indicating that the latter were Agents for others. It is conceded that the defendants were not the Dubashes of the Industrials at any time; but it is said that the defendants knew that Arbuthnot & Co., were the managing Agents of the Industrials, and that the evidence establishes that it is only as such Agents they entered into the contracts with the defendants.

Mr. Srinivasa Aiyangar objects to the admission of this parol evidence. He relies upon S. 92 of the Evidence Act and quotes an *obiter dictum* of Wilson J. in *Soopromoniam Chetti* v. *Heilgers* [1] in support of his position. As pointed out in *Venkata Subiah Chetty* v. *Govindarajulu Naidu*[2] the question whether one of the contracting parties was acting for himself or on behalf of a principal does not relate to the terms of the contract. *Bateman* v. *Phillips* [3] is a direct authority in favour of the admissibility of parol evidence under such circumstances. See also Bowstead on Agency, Article 90 and the cases quoted under it. But there can be no doubt that *prima facie* a contract by a person in his own name without more is a contract by him as principal. The authorities quoted by Mr. Srinivasa Aiyangar fully bear out this proposition. Vide *Dutten* v. *Marsh* [4]. The case of *Parker* v. *Winlow*[5] is an extreme case. Even though the principal was disclosed, the personal liability of the Agent was upheld on the ground that he did not sign as Agent. There is nothing in S. 230 of the Indian Contract Act which makes a departure from the rule of English law, as contended for by Mr. Richmond. That section is not exhaustive of the rules of evidence. There is no authority for the position that only in the cases mentioned in the section, presumption as to the nature of the liability of the contracting party arises. In the case before us the Principal's name is not disclosed and the person signs for himself. The presumption is therefore strong that the contract was with Arbuthnot & Co., as Principals.

1. (1879) I.L.R. 5. C. 71.
2. (1907) I. L. R. 31 M. 45.
3. (1812) 15 East 272, s. c. 104 E. R 847.
4. (1871) L. R. 6 Q. B. 361.
5. (1857) 7 E. Bl. 942. =27 L. J. Q. B. 405=119 E. R. 1497.

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Mr. Richmond relies upon Exhibit J. series to rebut this presumption. It appears from these documents that Arbuthnot & Co., debited the Industrials with the advances made to the defendants under the contracts. These adjustments have not been shewn to have been done with the knowledge and consent of the defendants. On the other hand this correspondence (Exhibit J. series) reads as if the contracting party was still Arbuthnot & Co., and that they were transferring the purchases and sales made by them to the account of the Industrials. There is no satisfactory evidence that the defendants were aware of the correspondence contained in J. series. The fact that large sums of money were advanced to the defendants shows that it was on the strength of the security lodged by them as Dubashes that it was done. As practically no other business was done by the defendants with Arbuthnot & Co., if the intention was to enable the Industrials to start business with the defendants on a new footing, the deposit would have been returned or transferred to the new company. Neither of these things was done and I have no hesitation in holding that the defendants did contract and believed they were contracting only with Arbuthnot & Co., in supplying jute and in purchasing the gunny bags. This position is rendered clearer still by a reference to Exhibit VIII. That document shows that for the A series contracts, the defendants received a commission of one per cent. as Dubashes. Under A series, there is no right to any commission; and it was admitted that there was no separate agreement for any commission with the Industrials. As I said before, the defendants were never the Dubashes of the Industrials. It is clear to my mind from these facts that the defendants transacted the plaint business only with Arbuthnot & Co., as their Dubashes. It was argued that as the jute was to be supplied at Chittivalasa and the gunny bags were to be taken from there, it fixed the defendants with the knowledge that the contract was with the new Company. I do not see any force in this. These articles were sold and purchased even before the floating of the Industrials at Chittivalasa and the place of performance of the contracts continued to be the same.

Mr. Ohearan who gave evidence as plaintiff's first witness makes admissions which shows that there was absolutely no change

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in the mode of transacting business at Chittivalasa in consequence of the formation of the Industrials. This is what he says:—

"I do not remember whether any change was made in the modes of dealing after that spinning and weaving company was formed. We were not asked to change the mode of correspondence or make any change in the modes of our dealings after the Industrials were floated. We received intimation to change the mode of accounts. I have not produced that intimation paper in Court; separate accounts in the name of the Industrials were opened. It is that account book. In II there is nothing to show that it was opened or kept in the name of Industrials. I see the book shown to me (III). There is no separate katha in it opened in the name of Arbuthnot Industrials prior to the insolvency of Artbuthnot & Co. III is the account book of Industrials itself. There was no change in the mode of corespondence between Arbuthnot and Co., and the defendants after the Industrials was floated. This is a letter sent by the Agent Mr. Greenfield to the defendants (VIII). The same commission was being allowed to the defendants although from 1895. The system of advances of monies under contracts for jute has been enforced althrough both prior and subsequent to the floatation of the Industrials. These are the letters that passed between the Agent of Arbuthnot & Co., and the defendants (IX Series). There was no change in the mode of correspondence. These are the gunny contracts (X). They were in the same form althrough. These are the receipts granted by the Agent for the value of the gunnies received from the defendants (XI Series). The receipts were in the same form althrough."

My conclusion on the facts are (*a*) that the business of Arbuthnot & Co., in Chittivalasa was transferred to the Industrials in 1905; (*b*) that the defendants were aware of this; (*c*) that even after this Arbuthnot & Co., continued their dealings with the defendants as Principals and not as Agents of the Industrials; (*d*) that the defendants had no reason to believe that Arbuthnots were acting in the sale and purchase of jute and gunny bags only as Agents of the Industrials and not for themselves; and (*e*) the appropriations of the plaintiff's company of the jute supplied by the defendants and debiting them with the

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price of the bags purchased must have been in pursuance of an understanding between Arbuthnot and Co., and the plaintiffs of which the defendants had no knowledge. I am inclined to think that Arbuthnot & Co., never severed the relationship subsisting between themselves and the defendants and that the plaintiffs were aware of this.

On these findings of fact, it follows that as the plaintiffs knew that the defendants and Arbuthnot & Co. were independent contracting parties, they can have no right of action. Even granting that the plaintiffs were not aware that Arbuthnot & Co., were dealing with the defendants with their own interests, the Industrials cannot put themselves in a more favourable position than their managing Agents. The principle of S. 231 of the Contract Act is this—As against the Agent transacting business in his own name, the Principal can claim the full benefit of the contract; as against the party contracting with the Agent, the Principal is bound by the equities subsisting between the Agents and contracting party. Even as against the Agent, it has been rightly remarked that the Principal must take the benefit with the burden. He cannot both approbate and reprobate with reference to the ordinary incidents arising out of the contract. (See *Joachinson* v. *Meghjee Vallabhdas* [1]). In claiming the benefit of a contract from a stranger the principle applies with greater force. The Principal, if he wants to enforce the contract must stand in the shoes of the Agent and practically sue *sub modo*. The observations of Lord Campbell (The Lord Chancellor) in *Bristowe* v. *Witmore* [2] applies to this case. His Lordship said " the principle which must, I think, govern this case is one of universal application, namely, that where a contract has been entered into by one man as Agent for another the person on whose behalf it has been made cannot take the benefit of it without bearing its burthens. The contract must be performed in its integrity. Here the appellant, as agent for the owner now represented by the respondents, stipulated for certain benefits in consideration of certain burthens which he undertook to bear, and certain labours which he undertook to perform. If he had authority to enter into such a contract the principal is of course bound. If he had not authority, then the Principal may repudiate the contract; but

1. (1909) I.L.R. 34 B. 292. 2 (1861) 9 H. L. C. 391.

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he cannot take that part of it which is beneficial to him without performing that which is onerous." Wright J. in *Montgomerie* v. *United Kingdom Mutual Steamship Association* [1] points out that "where the Principal is an undisclosed Principal, he must, if he sues, accept the facts as he finds them at the date of his disclosure, so far as those facts are consistent with reasonable and proper conduct on the part of the other party." The decision of the Court of Appeal in *ex parte Dixon : in re Henley* [2] shows that if the third party had no reason to believe that the Agent was not transacting business in his own name, the principal is bound by the obligations he had subjected himself to in the course of the transaction. The same principle is laid down in *Borries* v. *Imperial Ottoman Bank* [3] accepting as well established the dictum of Willis J, *Semenza* v. *Brinslay* [4], to the effect "In order to constitute a valid defence within the rule in *George* v. *Cleggett* [5], the plea should show that the contract was made by a person whom the plaintiff has intrusted with the possession of the goods, that the person sold them as his own goods in his own name as principal with the authority of the plaintiff, that the defendant dealt with him as and believed him to be, the principal in the transaction, and that before the defendant was undecieved in that respect the set-off accrued." The facts I have found bring this case within the above rule.

In the Cyclopedia of Law and Procedures Volume XXXI page 1598, the proposition is thus succinctly stated "And where a Principal accepts a contract made by the Agent, he takes it as the Agent made it, and subject to all equities and defences arising out of the conditions thereof, and the means and instrumentalities by which the Agent procured, even though the Agent acted without authority or in excess of his powers." See also 1 Halsbury S. 447. In the present case it is admitted that the amount of the plaintiff's claim can be met fully from the money deposited in Arbuthnot & Co.; consequently plaintiffs are not entitled to any decree against the defendants.

For all those reasons, I am of opinion that the suit fails I would dismiss the appeal with costs.

1. (1891) 1 Q. B. 370.
2. (1876) L. R. 4 Ch. D. 133.
3. (1873) L.R. 9 C.P. 38.
4. (1865) 18 C. B.N. S. s.c. 31, L. J. C. P. 161.
5. (1797) 7 Term. Rep. 359 s.c. 101 E.R. 1019.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

Arunachella Aiyar and others ... *Plaintiffs** (*Appellants*)

v.

T. Ramaswami Iyer and others ... *Defendants* (*Respondents*).

Limitation Act, art. 116—Vendor and purchaser—Registered sale deed—Implied covenant for title—Knowledge of defect of title—Not excluded by—Breach of—Limitation applicable to.

In all registered conveyances executed after the Transfer of Property Act, a covenant for title is implied by S. 55, cl. 2 of that Act and the breach of that covenant is a "breach of a contract in writing registered", within the meaning of art. 116 of the Limitation Act.

Krishnan Nambiar v. *Kannan* (1) followed, *Kovvur Basiri Reddi* v. *Nagamma* (2) dissented from, *Hanuman Kamat* v. *Hanuman Mandur* (3) distinguished.

The covenant is not excluded by the mere fact that the vendee was aware of the defect in title.

Subbaraya Reddiar v. *Rajagopala Reddiar* (4), followed.

Second appeal from the decree of the District Court of Tanjore in A. S. No. 297 of 1911 preferred against the decree of the Court of the District Munsiff of Tiruvadi in O. S. No. 45 of 1910.

C. V. Anantakrishna Aiyar for Appellants.

G. S. Ramachandra Aiyar for Respondent.

The Court delivered the following

Judgment:—The learned District Judge has reversed the decision of the District Munsiff who granted a decree for money against the 1st defendant personally. The District Judge held that the suit of the plaintiff (the vendee) so far as it prayed for recovery of compensation from the 1st defendant (the vendor) for the breach of the covenants for title and possession was barred by limitation, the period being three years under article 62 or 97 of the Limitation Act. The learned District Judge relied on *Kovuri Basivi Reddi* v. *Tallapragada Nagamma* [2], in support of his decision.

*S. A. 636 of 1913. 9th September, 1914.

1. (1897) I.L.R. 21 M. 8.
2. (1910) I.L.R. 35 M. 39.
3. (1891) I.L R. 19 C. 123.
4. (1914) M.W.N. 376.

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It is contended before us that as the sale-deed in this case was executed in 1904 long after the Transfer of Property Act came into force, the proper article to be applied in respect of a suit claiming compensation for breach of an express or implied covenant of title and quiet enjoyment is article 116 which allows a period of six years. We think that this contention must be upheld. It has been decided in a series of cases beginning from 1889 (See the two cases reported in *Kasturi Naicken* v. *Venkatasubba Mudali* [1], and *Narayana Reddi* v. *Padarama Reddi*, [2]) that in all registered conveyances executed after the Transfer of Property Act come into force, a covenant for title is implied by S. 55 cl. 2 of that Act, that the registered conveyance should be read as if it expressly embodied that covenant and that the breach of that covenant is the breach of a contract in writing registered within the meaning of article 116.

We need refer only to a few of the later cases namely those in *Chidambaram Pillai* v. *Swethasami Thevar* [3], *The Zamindar of Vizianagaram* v. *Behara Surya Narayana Pantulu* [4], *Nageswara Row* v. *Sambasiva Row* [5], *Kirshnan Nambiar* v. *Kannen* [6], and *Unichaman* v. *Ahmed Kuthi Kyai* [7]. It must however be admitted that the case in *Kovvuri Basivi Reddi* v. *Tallapragada Nagamma* [8], seems to throw some doubt on the decision in *Krishnan Nambiar* v. *Kannan* [6], which follows the current of the earlier decisions. The reasoning in *Kovvur Basivi Reddi* v. *Tallapragada Nagamma* [8], is not quite clear and one of the two learned Judges who took part in it was also a party to the later decision which expressly followed the current of the earlier decisions (see the subsequent case reported in *Nageswara Row* v. *Sambasiva Row* [5], distinguishing the case in *Kovvuri Basivi Reddi* v. *Tallapragada Nagamma* [8], as "not in point.") In *Kovvuri Basivi Reddi* v. *Tallapragada Nagamma* [8], the correctness of the decision in *Krishnan Nambiar* v. *Kannan* [6], was doubted on the strength of the Privy Council ruling in *Hanumankamat* v. *Hanuman Mandur* [9], wherein their Lordships held that in the case of a conveyance

1. (1889) I M. L. J. 162.
2. (1891) 1 M. L. J. 479.
3. (1904) 15 M. L. J. 396.
4. (1901) I. L. R. 25 M. 587.
5. (1911) M. W. N. 361.
6. (1897) I. L. R. 21 M. 8.
7. (1897) I. L. R. 21 M. 242.
8. (1910) I. L. R. 35 M. 39.
9. (1891) I. L. R. 19 C. 123(P.C.)

executed in 1879 (before the Transfer of Property Act came into force) a suit for compensation for failure of consideration (that is, for the recovery of the purchase money paid to the vendor) through the failure of the vendee to obtain possession of the land sold fell under article 97 (3 years rule) that the date of the cause of action was the date of the obstruction by the vendor's co-parceners. Their Lordships had no occasion to consider the effect of S. 55, cl. (2) of the Transfer of Property Act on a registered conveyance executed after the date of that Act. That case is therefore not an authority for the proposition that to a suit brought on the covenant added by the statute law to all registered conveyances executed after the Transfer of Property Act came into force, article 116 did not apply but only article 62 or 97. In *Unichaman* v. *Ahmed Kuthihkayi* [1], a similar argument was addressed to a Bench of this court, namely that article 97 applied to such a suit because the Bombay High Court held that view in *Sawaba Khandapa* v. *Apaji Jotirow* [2]. But as a Division Bench of this Court point out in *Unichaman* v. *Ahmed Kuthihkayi* [1], the Transfer of Property Act was not in force in Bombay when that decision in *Sawaba Khandapa* v. *Abaji Jotirow* [2], was given. This distinction seems not to have been in the minds of the learned Judges who decided I. L. R. 35 M. 39. We might add that Benson J. who took part in I. L. R. 35 M. 39 was also a party to the prior case in I. L. R. 21 M. 242. Next it was contended that Bakewell J. doubted the correctness of I. L. R. 21 M. 8 in his judgment in *Ramanatha Aiyar* v. *Ozahoor Pathiriseri Raman Nambudri* [3]. In the first place the observation is obiter. In the second place, (with the greatest respect) we find difficulty in following the observation of the learned Judge that the Transfer of Property Act "may be construed as having annexed the statutory agreement" (that is the contract embodying the covenant for title and other covenants) to the *contract of sale* and not to the *deed of conveyance itself.* As said in Dart's Vendors and Purchasers Vol. I. p. 567, these covenants are by the English Conveyancing Act 1881, S. 7 "implied in every *conveyance*" and we do not see why they should be held under the Transfer of

1 (1897) I. L. R. 21 M. 242. 2. (1887) I. L. R. 11 B. 475.
3. (1913) M. W. N. 1029 at 1034.

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Property Act to be attached only to the *contract of sale* and not to the *conveyance*. The other learned Judge Miller J. was prepared to follow I. L. R. 21 M. 8. The Respondent's Vakil's argument that a covenant for title cannot be implied where the buyer knows the defect of title is opposed to the recent decision by Seshagiri Aiyar J. in *Subbaraya Reddiar* v. *Rajagopala Reddiar* [1] with which decision we agree.

The learned District Judge has decided the case only on the preliminary ground of limitation raised in the 9th ground of the appeal memorandum presented to the District Judge. We are unable to agree with him in that finding and if article 116 applies, as we hold it to apply it is not denied that the suit is not barred. The question whether plaintiff can be given a decree for recovery of the money due under the original hypothecation bond has also not been decided (see O. 41, R. 33 of the Civil Procedure Code and the wide powers of the Appellate Court).

We therefore reverse the District Judge's decision and remand the case for the disposal of the appeal preferred to the District Court on the other points arising in the case.

Costs will abide the result.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Oldfield and Mr. Justice Seshagiri Aiyar.

Gandla Pedda Nayanna and others ... *Appellants** (*Plaintiffs.*)

v.

Sivanappa and others ... *Respondents.* (*Defendants.*)

Pedda Nayanna v. Sivanappa.

Specific Relief Act, S. 42—Declaration that decree in favour of defendant against third party was not binding—Brutum fulmen—No ground for refusing.

A suit for a declaration by a person that as he is the owner of the property, the decree obtained by the defendant against a third party on the footing that he is the owner would not bind him is not liable to be dismissed on the ground that on his own allegations, the decree in favour of the defendant was but a *brutum fulmen* and did not need to be set aside.

Rajah Nilmony Singh v. *Kally Churn Battacharya.* (2), distinguished.

Second appeal from the decree of the Court of the District Judge of Kurnool in A. S. No. 162 of 1912 preferred against the

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* S. A. No. 372 of 1913. 2nd September 1914.

1. (1914) M. W. N. 376.

2. (1874) L.R 2 I. A. 83.

decree of the Court of the District Munsif of Kurnool in O. S. No. 1041 of 1910.

M. O. Parthasarathi Aiyangar for the Appellants.

N. A. Vaidyanatha Aiyar for *C. V. Ananthakrishna Aiyar* for Respondents.

The court delivered the following

Judgment:—The Lower Appellate Court has dismissed the suit on the pleadings on the grounds that (1) it is barred under Order II, Rule 2 of the Code of Civil Procedure (2) that it is not maintainable as framed.

The material facts are as follows:—The plaintiffs claim the suit property and are in possession of it as reversioners of Nagisetti. The (1st and 2nd) defendants husband and wife, have also been claiming it as reversioners, but under a different title derived from one Veeranna. In O. S. No. 651 of 1910 the 1st defendant obtained a decree against the 2nd defendant for a declaration of his title as Veeranna's reversioner, her mother having been the last person in possession of the property. In O. S. No. 298 of 1911 the present plaintiffs obtained a decree against the present defendants declaring their right as reversioners of Nagisetti to certain properties other than those now in suit. O. S. No. 651 was pending, when O. S. No. 298 was filed but was decided before it.

The objection to the suit with reference to Order II, rule 2 is based on the fact that the properties now sued for were in the defendant's possession, when O. S. No. 298 was filed, but have, as the plaintiffs allege come into their own possession subsequently. The plaintiffs' suit is for a declaration that the decree in O. S. No. 651 was collusive and has no effect so far as they and the suit properties in their hands are concerned; and the contention is that they should have asked for their relief in O. S. No. 298 and therefore cannot ask for it now. The learned District Judge argued that because they were out of possession of these as well as the other properties for which they did sue, their cause of action is available for both, and they should have sued for possession of the whole estate. But they are not suing now on any cause of action, directly connected with possession since they have succeeded in enforcing their right to it otherwise. Their present cause of action, the alleged cloud

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on their title, created by the decree in O. S. No. 651, is a distinct grievance which moreover arose after O. S. No. 298, was filed, and therefore could not have been pleaded in it. In these circumstances there can be no objection to the plaintiffs claiming now what they could not have claimed before. This objection is accordingly invalid.

This conclusion affects the learned District Judge's argument regarding the maintainability of the suit because he explained plaintiff's failure to ask for what he considered the appropriate relief, a general declaration of their title, by reference to his finding that Order II, R. 2 debarred them from doing so. This application would however have in any case been useless, because their suit, as brought, must necessarily have involved their establishing (1) their title, since their right to sue must be conditional on their establishing it, and (2) other particular facts entitling them to have the decree declared of no effect.

The more serious objection to the suit is stated by the learned District Judge, as being that the "decree in O. S. No. 651 cannot and does not purport to bind the plaintiff and that they cannot ask the court to grant a bootless declaration in respect of a matter, which is self-evident." Before dealing with the correctness of this conclusion, I observe that no authority has been shown for treating it, as the learned District Judge has done, as negativing the right to sue directly and not merely as ground for the exercise of the Court's discretion to refuse the declaratory relief asked for. It is in fact relevant only as the latter.

That the decree in O. S. No. 651 binds only the parties to it, the defendants, is of course self-evident. But it does not follow that the declaration asked for by the plaintiffs regarding it will be without effect. For it will enable them, if they obtain it, to frustate the efforts, which the 1st defendant may be expected to make to obtain delivery of the property in execution against the 2nd defendant and prevent their being lent, if the 1st defendant is successful to regain possession by an application under O. XXI, R. 100, of the Code of Civil Procedure or perhaps eventually by a suit. It is relevant that the 1st defendant's pleading in no way disclaims his right to

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take such action. Vide *Thakurain Jaipal Kunwar* v. *Bhaiya Indar Bahadur Singh* [1]. For he alleged the validity of his decree and of his title under Veeranna, denying the validity of the plaintiff's title under Nagisetti. And apart from this indication of the defendants' intentions the presumption must be against them, since they are in no better position than the holder of an instrument alleged to be void, of whom it has been said "If an instrument ought not to be used or enforced, it is against conscience for the party holding it to retain it, since he can only retain it for some sinister purpose."(*Vide* Story's Equity Jurisprudence, 13th Ed. I. 10) and this is not to be restricted to transactions, to which the plaintiff is a party. For the learned author proceeds "if it is a negotiable instrument, it may be used for a fraudulent and improper purpose to the injury of a third party."

Most of the decisions relating to declarations deal with claims to relief in that form in order to the protection of an existing title against repetition of direct denials of it, which have already taken place, and turn on the plaintiff's possession of an interest, entitling him to sue or on the possibility of his asking for consequential relief; and they are not of assistance here, where it must be assumed that the plaintiffs have title and possession and there can be no question of their duty to ask for the latter. Here the sole question is whether the possible danger to be averted by a declaration asked for is so clear and immediate that the court should use its discretion to grant it. The cases do not suggest any test of general application, but have been decided on the particular circumstances of each; and it is natural that this should be so. It is then possible only to consider how the court's discretion was exercised in those, the circumstances of which resemble most clearly those before us.

In the case of the *Rajah of Pachati* [2] it was observed that plaintiff could not have a declaration for future use in consequence of a mere assertion, which might (for all that appeared) have been oral but that one might have been granted if he had been applying for the cancellation of a deed impugning his title: and in *Kathama Nachiar* v. *Dorasinga Thevar* [3] the court, whilst refusing a declaration, when the defendant had merely carried hostility by

1. (1904) L. R. 31 I. A. 67. 2. (1879) L. R. 2 I. A. 83.
3. (1875) L.R. 2 I. A. 169.

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granting power of attorney to an agent in order that he might assist in frustating the plaintiff's claim to a Zemindari, said that its decision would not preclude his impeaching any actual decision of the succession to his prejudice. In *Chinnasami Mudaliar* v. *Ambalavana Mudaliar* [1] a declaration was granted regarding an adoption, though it had not been alleged by any party to it in any proceedings by or against the plaintiff. In *Harendralal Rai Chowdry* v. *Nawab Salimalla Bahadur* [2], the court made a declaration regarding a revenue sale, though the plaintiff was not the defaulter, and observed "It has been suggested that plaintiff might have waited, till his title was challenged. In our opinion he was not bound to wait, till he actually found himself in jeopardy... It is perfectly true that the cloud on his title must be cast, before he can ask for its removal, he must allege and prove hostility on the part of the defendants, for no court will move on purely speculative grounds" and held that the sale had been brought about to annul the encumbrances of the tenure-holders, of whom the plaintiff was one, and that he was therefore entitled to relief. None of these cases in which the court interfered or would have interfered, was stronger than the present.

I refer next to two cases, in which the facts were very similar to those now in question. The defendants in each were the persons responsible for a sale under a mortgage decree, to which the plaintiff was not a party, of property, which he claimed and of which he was in possession. It is not a valid ground of distinction that in those cases the danger apprehended was a delivery after a sale whilst here it is one under a decree. For in them also the delivery would be made without notice to the plaintiff. In one of these cases, *Deo Kali Koer* v. *Kedar Nath* [3], it was said that" none of the declarations claimed were expressed as declarations of the plaintiff's right to property and that, "though the proposition at which he aimed, might be in some measure involved in those declarations, that was not what is sanctioned by S. 42." This would, it might have been supposed, have been reason for dismissing the suit for declaration alone. It was however treated only as entailing that the plaintiff had implicitly asked for an

1. (1905) I.L.R. 29 M. 48. 2. (1910) 12 C. L. J. 336.
3. (1912) I. L. R. 39 C 704.

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injunction and must pay court fee for that relief. In these circumstances it is not clear what the court intended to lay down in the statement quoted, and I therefore prefer to follow *Shivram Chintamani* v. *Jivu* [1], in which it was held that, when the plaintiff's title was denied in proceedings, to which he was a stranger, he was entitled to sue and need not wait till he was dispossessed.

Lastly *Viziasami Tevar* v. *Sasivarna Tevar* [2], has been much relied on by the defendants for the position that a declaration should not be granted, when the transaction to be declared invalid would on plaintiff's own allegations be but a *brutum fulmen* against him. That decision turned mainly on the vexatious nature of the plaintiff's suit and the court's inherent right to prevent abuse of its process by dismissing it. But, so far as it proceeded on the ground referred to, it is distinguishable from the case before us. There the court recognised that if the party alleging an adoption pretended that the conditions, which would validate it, existed, the person affected by it should be allowed to impeach it, but it held that the adoption attacked by the plaintiff was so totally nugatory from his point of view that it would be futile to make it the subject of judicial investigation. Here the decree between the defendants will be in no way nugatory with reference to the plaintiff's right, notwithstanding that they were not parties to it. For, as already pointed out, the court will have no choice but to order a delivery under it and will have no right to hear the plaintiff's objection before doing so. In the one class of cases it cannot be supposed that the court would act on the transaction at all; in the other it is clear that it would be able and likely to do so to the prejudice of a third party, the plaintiff, until it could hear him. I may point the distinction by reference to *Grey* v. *Mathias* [3], and *Bromly* v. *Holland* [4], the court observing in the latter "It is not just to consider the instrument, merely having regard to the question whether the demand can be directly founded on it, for an instrument, which apparently though not really, (which must be shown by circumstances *de hors*) creates an incumbrance, may by

1. (1888) I. L. R. 13 B 34.
2. (1905) I. L. R. 28 M 560.
3. (1800) 5 Vesey. Junior. 286.
4. (1802) 7. Vesey. 3.

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being produced defeat the ends of justice....... ..I do not go the length that, if it is clear that no use can be made of the instrument, that is ground enough for the equitable jurisdiction to take it out of the possession of the party who can make no use of it beneficial to himself; but, if a use may be made of it, prejudicial to another, I should have an inclination to transfer the possession of it."

The law standing thus, I hold that the lower Court might properly on proof of the plaintiff's allegations, use its discretion to grant the declaration they claim. The appeal must therefore be allowed and the lower Court's decree set aside, the appeal being remanded for readmission and disposal on the merits in the light of the foregoing.

Costs in this Court will be costs in the case.

Seshagiri Iyer, J.:—The factsin this Second Appeal are fully stated in the Judgment of my learned colleague which I have had the advantage of reading. I shall deal very briefly with the two questions of law which were argued before us.

The first suit was based on the title of the plaintiffs to succeed as reversioners and it admittedly did not include the present property. If the plaintiffs sued upon the same title to recover possession of the plaint property there is no doubt that O. II, R. 2 would be a bar. But they got possession afterwards, and their present complaint is that the defendants are setting up a false title to it which has necessitated their seeking the aid of the Court. If the contention of the respondents were to prevail, it would involve this *viz.*, that a plaintiff claiming to recover possession of the property must also pray that he should be protected against all possible violations of his right in future in respect of that property. It would be futile to file a suit of that nature, and the Court would have rejected it at once. The lower appellate Court was therefore wrong in holding that the suit was barred by O. II, R. 2.

The more important question which the Judge has dealt with in less detail relates to the maintainability of the suit under S. 42 of the Specific Relief Act. I do not agree with his view of the averments in the plaint. He is apparently inclined to hold that if the plaintiffs sued for a declaration regarding their title, the suit would lie; but he reads the plaint as not asking for such

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a declaration. Reading prayers (1) and (2) of the plaint I have no doubt that the plaintiffs ask for declarations that the property in suit belongs to them as the reversioners of Nagisetty, that the defendants have no manner of title thereto, and that the decree collusively obtained behind their backs by the 1st defendant against defendants 2 and 3 is not binding on them. The real point for decision is whether a suit of this nature is competent, I shall refer very briefly to the history of the legislation which resulted in the enactment of S. 42 of the Specific Relief Act as that will show what classes of cases the legislature intended to bring within its operation. As was pointed out by Wilson J. in *Bhujendra Bhuson Chatterjee* v. *Trigunanath Mookerjee* [1], under the English law a suit for a bare declaration did not lie. unless the party suing could show that he was entitled to some further relief as a result of the declaration. This rule of English Law was in force as a rule of equity and good conscience in this country, until the enactment of. S. 15 of Act VIII of 1859; that section ran thus:—"No suit shall be open to objection on the ground that a merely declaratory decree or order is sought thereby, and it shall be lawful for the Civil Courts to make binding declarations of right without granting consequential relief." Even after this section the earlier decisions were to the effect, following the principle of English Law already referred to, that, unless there was a right to some consequential relief which if asked for, might have been given by the same Court, or unless it was required as a preliminary to obtaining reliefs in some other Court, the Courts should refuse to grant a bare declaration See *Kathama Nachiar* v. *Dorasinga Tevar*[2] *Sheo Singh Rai* v. *Mussumut Dahko*[3] *Sree Narain Mitter* v. *Sreemuthy Kishen Soondery Dossee* [4]. The Specific Relief Act was afterwards passed which undoubtedly widened the scope of the remedy. Under S. 42 of that Act the plaintiff has only to show that he has some legal character or some right to property, and that his opponent is either denying or interested in denying such legal character or title. The object of the section is really to perpetuate and strengthen testimony regarding the title of the plaintiff so that adverse attacks upon it may not weaken it. The policy of the legislature is not only to secure to a wronged party

1. (1882) I. L. R. 8 C. 761.
2. (1875) L R. 2 I. A. 169.
3. (1878) I. L. R. 1. All. 668.
4. (1873) 11 Beng. L. R. 171.

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possession of the property taken away from him, but also to see that he is allowed to enjoy that property peacefully. In other words, if a cloud is cast upon his title or legal character he is entitled to seek the aid of the Court to dispel the cloud.

What we have to consider in this case is whether the decree obtained by the 1st defendant against the 2nd defendant denies the plaintiff's title to this property. It has been said that it is not the function of the Court to enunciate abstract truisms of law; following that reasoning it may be argued that as the fraudulent decree can in no way affect plaintiff's rights, the Court should not lend itself to the task of declaring what is obviously indisputable. But although the decree may not affect plaintiff's rights *in presenti* it is evidence which if allowed to stand may result at some future in disturbing the plaintiff's title. I think that is a sufficient grievance which the Courts should remedy under S. 42 of the Specific Relief Act.

Coming to decided cases, in *Nurdin* v. *Allavuddin* [1] a patta was antedated and affixed to the plaintiff's house. The learned Judge held that this was not an infringement of the plaintiff's title and that he has no cause of action to sue; this case sounds as if it were an echo of the rulings under S. 15 of Act VIII of 1859. The decision in *Vijayasami Thevar* v. *Sasivarna Thevar*[2] cannot be explained away on the same ground. It lays down that it is not every fabrication of evidence that would enable a plaintiff to come before a Court of law to claim a declaration. But the learned Judges who decided this case were parties to the decision reported in *Nurdin* v. *Allavuddin* [1]. In the latter case, an adoption was set up which had not the immediate effect of injuring the plaintiff's title. The adoptee was creating evidence which might at some future time throw doubt upon the plaintiff's title. The learned Judges held that that was a proper case for granting a declaration under the Specific Relief Act. Thus, so far as Madras is concerned, the latest authority is in favour of the position that wherever evidence is being created which might ultimately result in disturbing the title of the plaintiff he will have a cause of action to sue under S. 42. The decision of the Judicial Committee in *Prithi Pal Kunwar* v. *Guman Kunwar* [3]

1. (1888) I. L. R. 12 M. 184. 2. (1905) I. L. R. 28 M. 560.
3. (1890) I. L. R. 17 C. 933.

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looks on the face of it as if it is opposed to the view taken in *Chinnasami Mudaliar* v. *Ambalavana Mudaliar* [1]. In that case a taluqdar died leaving a son and a widow, and this son afterwards died leaving a widow who succeeded to the estate. It was held by the Privy Council that the suit of the widow in possession for a declaration that an adoption made by her mother-in-law was invalid should be dismissed. Sir Barnes Peacock in delivering the judgment of the committee referred with approval to the statement of law contained in *Sree Narain Mitter* v. *Sreemathy Soondary Dossee*[2] and stated that "All that is suggested by the learned Counsel on the part of the appellant in support of a declaratory decree is this; that at some time or another after the death of the present plaintiff the person who according to the plaintiff's contention is not an adopted son may by some means, either by act of the Government or otherwise obtain possession as an adopted son." This was held not to be a sufficient ground for granting the declaration prayed for. Reading the judgment carefully I am of opinion that what the Judicial Committee intended to lay down was that it was a matter of discretion in such cases whether a declaration should be granted or not. The decision cannot be regarded as laying down that a suit to avert a possible apprehended danger will not lie.

I therefore agree in the conclusion of my learned colleague that the suit is maintainable.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir John Edward Power Wallis Kt. Officiating Chief Justice, Mr. Justice Ayling and Mr. Justice Seshaghiri Aiyar.

Muthammal ... *Appellant* *
v. (*Plaintiff.*)

The Secretary of State for India in Council through the Collector of Tinnevelly ... *Respondent* (*Defendant*).

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Boundaries Act (Act XXVIII of 1860), S. 25—Survey and Boundary Marks Act (Act IV of 1897)—Order under—Finality of—Not only to order but also to grounds of—Res judicata—C. P. C. S. 11—Principles of—Universal application—Issues need not be formally raised—Substantially in issue.

In a suit by the plaintiff to recover certain lands which she alleged formed part of the mitta purchased by her and had been wrongfully taken possession of by the

* L. P. A. No. 41 of 1913. 9th October 1914.

1. (1905) I. L. R. 29 M. 48.

2. (1873) 11 Beng. L. R. 171.

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Government and in the alternative for the return of the peishcush paid by her proportionate to the portion in the possession of the Government it appeared that in 1880 the boundaries of the mitta had been delineated under the Boundaries Act XXVIII of 1860 " when the Boundary Settlement Officer found that the lands in question had never formed part of the mitta and had excluded them accordingly from the limits of the mitta and the said order of the settlement officer had become final, no suit having been brought to set it aside within 1 year as required by S. 25.

Held, that both the decision of the Settlement Officer that the lands did not form part of the mitta purchased by the plaintiff and the ground of the decision *viz.*, that it never formed part of the mitta were *res judicata* and barred the suit.

Per Seshagiri Aiyar, J. The general principles enunciated by S. 11 C. P. C. are of universal application. The plea of *res judicata* or estoppel is available not only as regards the final conclusion of the Court or officer but also regarding all findings necessary for arriving at that conclusion whether they are given on formal issues raised in the case or are referable to the points which must have been the basis of the final determination *Kama Raju* v. *The Secretary of State for India* (1), followed.

Appeal under S. 15 of the Letters Patent against the judgment of the Hon'ble the Chief Justice, dated the 10th day of February 1913 in A. S. No. 199 of 1910 preferred against the decree of the Court of the Subordinate Judge of Tinnevelly in O. S. No. 57 of 1908.

[See 24 M. L. J. 405 for the Judgment of the Division Bench].

Mr. L. A. Govindaraghava Aiyar for the Appellant.

The only question arising is whether plaintiff is entitled in the circumstances of the case to a refund from the Government of a proportionate amount of the peishcush already paid by him for the whole Mitta. (In answer to a question from the Chief Justice the appellants' Vakil gave up the prayer for declaration of the amount of peishcush due in the future). I admit my liability to pay the peishcush for the Mitta as a whole, if the Government chooses to collect the amount from me. The Government according to my contention being a co-owner with me in the Mitta, is liable to contribute in proportion to its interest in the Mitta. If there were a stranger in the place of the Government, he will be liable to contribute in proportion to his interest in the Mitta, towards the peishcush which has been taken from me for the whole Mitta. See *Raja of Vizianagaram* v. *Rajah, Setrucherla*,[2] The fact of the Government being a co-wner does not make any difference in principle. (*Ayling, J.* In this case you ask in

1. (1887) I. L. R. 11 M. 309 F.B. 2, (1903) I.L.R. 26 M. 686,

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effect for an apportionment of the peishcush) No; *Wallis C.J.* You ask for a refund of the peishcush proportionate to the share of the Government in the Mitta). Yes, I want a refund not an apportionment of the assessment between myself and the Government., [*Ayling J.* According to your contention Government pays itself in respect of the extent of the Mitta in its possession ? Is that not a legal fiction]. The lands are liable, not myself or the Government as such, whoever is owner of the Mitta should contribute.

[*Seshagiri Aiyar, J.*—If Government assigns its share of the Mitta to a stranger he will be liable to contribute]. Yes. [*Ayling J.* S. 58 of the Revenue Recovery Act takes away our jurisdiction over questions relating to the rate of land revenue or to the amount of assessment on portions of a divided estate. You are severing the capacities of Government and asking as to hold that we can apportion the assessment as between you and the Government as owner of the land.] I do not ask for apportionment of peishcush or reduction of the amount. I admit my liability to pay the whole amount in the first instance, if the Government as tax gatherer chooses to take the whole from me. I submit that I have paid what both myself and the Government as owner of a part of the mitta are liable to pay. I claim equitable contribution against the Government as owner of the land, just as I can claim against any stranger in possession of a part of the mitta. If Government can take advantage of the law of the land and claim by prescription against me, it is subject to any equities that I may have against the Government.

S. Swaminathan for Government Pleader for Respondent.

The suit is framed against the Government as Government and not as a landholder. The claim for refund indirectly amounts to an apportionment. 26 M. 686 is distinguishable. In that case there was no question as to the amount of the assessment fixed by the Government. In 26 M. 686 the revenue authorities had already ascertained and fixed the amount due from all the shares.

(*Wallis, C. J.*—That is not the ground on which the decision is put). The object of S. 58 is to allow the Government a

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freehand in fixing the revenue and the appellant requires a Civil Court to fix the revenue or to apportion it.

[*Wallis, C. J*:—No; the Government can enhance the assessment and apportion that in any way it pleases, next year]. If your Lordships direct a refund of the amount for fasli 1317—then the rate for 1317 is varied.

[*Seshagiri Aiyar J.*—No; instead of the plaintiff paying the whole amount, the Government as co-owner of the Mitta will have contributed in proportion to its share in Mitta. That will be the only effect of a decision directing a refund. The whole question is whether we can direct an equitable contribution to be made by the Secretary of State as owner of lands.]

The Court delivered the following

Judgments:—*The Officiating Chief Justice.* In this case the plaintiff sued to recover certain lands which she alleged to form part of her Mitta and to have been wrongfully taken possession of by Government, and in the alternative for a reduction of the peishcush paid by her for Fasil 1317 proportionate to the extent of the lands which had been taken from her. The boundaries of the mitta and the adjoining Government lands were delineated under the Boundaries Act XXVIII of 1860 in the year 1880, when the Boundary Settlement Officer found that the lands in question had never formed part of the area of the Mitta and accordingly excluded them. The proprietor of the Mitta did not contest this decision by filing a suit under S. 25 of the Act as he might have done. In this circumstance the decision of the Boundary Settlement Officer that the lands in question did not form part of the Zemindary is *res judicata* according to the decision of the Full Bench in *Kama Raju* v. *The Secretary of State for India*[1] and I think that the ground of the decision, *viz.*, that they never had formed part of the Mitta is also *res judicata* as having formed the ground of decision. The Subordinate Judge was therefore right in dismissing the plaintiff's suit on this ground. In the view I take of the case, the question whether the Court is precluded by the terms of S. 58 of the Madras Revenue Recovery Act II of 1864 from entertaining the plaintiffs' claim for a return of proportionate peishcush for the fasli in question, as to which there was a difference of opinion between

1. (1887) I. L. R. 11 M. 309.

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the learned Judges who heard the appeal does not arise. The appeal fails and is dismissed with costs.

Ayling J :—I agree.

Seshaghiri Aiyar, J :—I entirely agree with my Lord. I only wish to say a few words with reference to the argument of Mr. Govindaraghava Aiyar that the decision of the survey officer in 1880 under S. 24 of Act IV of 1897 is conclusive only as regards the actual decision arrived at in the case namely, that the lands claimed belonged to the Government and not to the Mittadar. I am unable to uphold this contention. Exhibit III, the petition to Mr. Baber, sets out the ground on which the claim was made. It says that prior to the sale of the mitta to the claimant's transferor, the mitta included the lands in dispute, and that at the sale in 1868, they passed to the purchaser. These were the questions which the Survey. Officer had to decide. He did decide them although he did not raise the points in the form of specific issues. S. 24 of the Boundaries Act says that such a decision is final subject to its being contested in a Civil Court within a specified time. It is conceded in this case that no suit was filed within the time limited. The decision is therefore binding upon the parties whether it is *res judicata* in the technical sense in which the term is used in the Civil Procedure Code or not; the general principles enunciated in S. 11 of that Code are of universal application. The question under that section will be whether a matter was substantially in issue and not whether it has been formally in issue. It was pointed out by the Judicial Committee of the Privy Council in *Krishna Behari Roy* v. *Brojeswari Chowdranee* [1]. "It has probably never been better laid down than in a case which was referred to in *Gregory* v. *Molesworth* [2], in which Lord Hardwicke held that where a question was necessarily decided in effect, though not in express terms, between parties to the suit, they could not raise the same question as between themselves in any other suit in any other form; and that decision has been followed by a long course of decisions, the greater part of which will be found noticed in the very able notes of Mr. Smith to the case of the Duchess of Kingston." In

1. (1875) L.R. 2 I.A. 283 at p. 286.
2. (1747) 3 Atkyns 626; s. c. 26 E. R. 1160.

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Narayanan Chetti v. *Kannammai Achi* [1], the learned Judges say that an appellate judgment operates by way of estoppel as regards all findings which are necessary to make the decree effective. *Gokul* v. *Shrimal* [2], lays down the same proposition. Apart from the plea of *res judicata*, as a question of estoppel the same considerations must apply. In Bigelow on Estoppel, after a full examination of all the English and American authorities, it is stated "a former judgment or verdict on the other hand, is conclusive between the parties to contested causes (as has already been intimated) of all necessary inferences arising from it as well as of the matters actually in issue." See also pages 97 and 157, Sir George Mellish expresses the proposition thus in *Alison's case, In re Bank Hindustan, China and Japan* [3]. "It is clear, I apprehend, that a judgment of the Court of Common Law is not only conclusive with reference to the actual matter decided, but that is also conclusive with reference to the grounds of the decision, provided that from the judgment itself the actual grounds of the decision can be clearly discovered. It seems clear from the authorities that the plea of *res judicata* or estoppel is available not only as regards the final conclusion of the Court or officer, but also regarding all findings necessary for arriving at that conclusion whether they are given on formal issues raised in the case or are referrable to the points which must have been the basis of the final determination. In the present case, the principal subject of controversy was whether the Court sale of the mitta included the lands which the Government claimed to exclude. It was on the ground that it did not form a portion of the mitta that the survey officer decided that the property did not belong to the claimant but to the Government. That pronouncement estops the appellant from claiming that the lands in dispute passed to him by the auction sale. As the peishcush was imposed only after the sale to him, it follows that the assessment on these lands was not taken into account in fixing the amount payable by the appellant.

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1. (1904) I. L. R. 28 M. 338. 2. (1904) 6 Bom. L.R. 288.
3. (1873) 9 Ch.A. 1 at 25.

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir John Wallis Kt. Officiating Chief Justice Mr. Justice Ayling and Mr. Justice Seshagiri Iyer.

S. Veeraraghava Aiyar ... *Appellant** (*Counter-petitioner, Defendant Judgment-Debtor.*)

v.

J. D. Muga Seit ... *Respondent* (*Petitioner, Plaintiff, Decree-holder*).

Civil Procedure Code, (Act V of 1908), *Ss. 13 and 44—Jurisdiction—Foreign judgment—Decree of Cochin Court—Transfer for execution—Competency of executing Court to question jurisdiction—O.* 21, *R. 7—Effect of alteration in the language—"May execute"—Discretion—Equivalent to "shall"—Submission to jurisdiction—Mere denial of—Voluntary, notwithstanding.*

Where a decree of a court in the Cochin state was transferred for execution to a Court in South Malabar.

Held, that it was competent to the latter court to refuse to execute the decree on the ground that it was passed without jurisdiction.

Judgments of courts in Native States are foreign judgments within the meaning of S. 13 and are enforceable whether by suit or by execution only subject to the limitations contained in that section.

The words "as if they had been passed in British India" in S. 44 relate only to the mode of execution and have not the effect of giving foreign judgments coming within that section all the incidents of the judgment of a British Court.

Per Seshagiri Aiyar J: (Agreeing with Sundara Aiyar, J.) Semble: Holders of decrees of courts in Native States coming within Government notification under S. 44, have both the remedy by suit and by execution open to them.

Quaere: If even in the case of decrees of British Indian Courts transferred for execution, jurisdiction of the Court passing the decree may not be questioned by the executing court. The alteration in the language of Sec. 225 (Or. 21, R. 7) has not made any difference in the matter. (*Sadasiva Aiyar, J. Contra*).

Obiter. The use of the word "may" in S. 44 by itself may not have given the court power to refuse execution on the ground of want of jurisdiction.

Per Sadasiva Aiyar J: The word "may" in S. 44 Civil Procedure Code; is equivalent to "shall" and the court has no discretion to refuse execution on the ground of want of Jurisdiction in the court which passed the decree.

Per Sundara Aiyar J: In executing decrees of foreign Courts, the court has a discretion to allow or not to allow execution.

Where the following facts appeared *viz.*, that the plaintiff in May 1908 obtained an interim injunction from the Cochin Court restraining the defendant (a non-resident British subject) from disposing of certain property belonging to him

* L. P. A. No. 71 of 1913. 6th October 1914.

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in the Cochin State and that in the following July, the latter filed a counter-petition for the removal of the injunction and the same day also filed a written statement denying jurisdiction but raising also a defence on the merits.

Held that the lower appellate Court committed no error in law in coming to the conclusion that under the circumstances there was no voluntary submission by the defendant to the jurisdiction of the Cochin Court.

Obiter: The decision in *Parry and Co.* v. *Appasani* (1), that it is enough merely to object to the jurisdiction to make the submission involuntary is probably no longer law.

Appeal under S. 15 of the Letters Patent against the decision of this Court in A. A. A. O. No. 53 of 1913, preferred against the order of the Subordinate Judge of South Malabar in A. S. No. 874 of 1914 presented against the order of the Court of the District Munsif of Palghat in E. P. No. 967 of 1910 in O. S. No. 82 of 1083 on the file of the District Munsif of Trichur.

The appeal originally came on for hearing on Monday and Tuesday, the 16th and 17th days of September 1912, the Court [*Sundara Aiyar* and *Sadasiva Aiyar JJ.*] made the following

Order:—Before disposing of this appeal we think it necessary to ask the Subordinate Judge to submit a finding whether the defendant in O. S. No. 82 of 1083 on the file of the District Court of Trichur submitted to the jurisdiction of that Court so as to make the judgment in that suit binding on him in proceedings taken to enforce it in a Court in British India. Both parties will be at liberty to adduce fresh evidence. The finding will be submitted within two months from the date of the receipt of this order and 7 days will be allowed for filing objections.

[In compliance with the above order, the Subordinate Judge of Palghat submitted the finding that the defendant had not submitted to the jurisdiction of the Trichur Court.]

The appeal then came on for final hearing on Friday the 4th day of April 1913.

S. Swaminadhan for Appellants.

C. V. Ananthakrishna Iyer for Respondents.

The Court delivered ‡ the following

* A. A. A. O. No. 53 of 1913. ‡ 25th April 1913.

1. (1880) I.L.R. 2 M. 407.

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Sundara Aiyar J.

Judgments:—*Sundara Aiyar, J.*—The important question of law argued in this second appeal is whether the holder of a decree for money passed by a Court in the native state of Cochin against a British subject not resident within that state is entitled to obtain execution of it in a British Court under Section 44 of the Civil Procedure Code irrespective of the question whether the Cochin Court had jurisdiction to make the decree according to the principles laid down by the Privy Council in *Gurdyal Singh* v. *Raja of Faridkot* [1]. The decree in this case was passed by the District Court of Trichur in the Cochin State and was sent for execution to the District Munsif's Court of Palghat. It awarded damages to the plaintiff against the defendant for a breach of contract. The defendant who is a native of Palghat in the District of Malabar objected to the jurisdiction of the Trichur Court, but the objection was overruled. The District Munsif of Palghat refused to grant execution on the ground that the Trichur Court had no jurisdiction to pass the decree according to *Gurdyal Singh* v. *Raja of Faridkot*[1] and *Shaik Atham Shib* v. *Davud Sahib* [2]. On appeal the Subordinate Judge held that the Trichur Court had jurisdiction to try the suit as the contract was entered into at Trichur and was to be performed there, the principle laid down in *Gurdyal Singh* v. *Raja of Faridkot*[1] being in his opinion applicable only when a suit is instituted on the decree of a native state and not when an application is made for execution by virtue of S. 44 of the Civil Procedure Code.

When the appeal to this Court first came on for hearing, it was contended that the defendant had submitted to the jurisdiction of the Trichur Court by appearing and objecting to the attachment before judgment of certain property. A finding was accordingly called for on the question whether there was submission by the defendant to the jurisdiction of the Trichur Court. The Subordinate Judge has submitted a finding in the negative.

There is no valid objection to this finding and the learned vakil for the respondent has properly abstained from attempting to impeach it. It is quite clear that, if a suit were instituted in a British Court on the judgment of the Trichur Court, it would not be

1. (1894) I. L. R. 22 C. 222. 2. (1909) I. L. R. 32 M 469.

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maintainable inasmuch as, according to the law laid down by the Privy Council, the judgment of the Cochin Court was void for want of jurisdiction so far as its enforceability in a British Court is concerned. The respondent maintains that as S. 44 of the Civil Procedure Code lays down that "the Governor-General in Council may, by notification in the Gazette of India, declare that the decrees of any Civil or Revenue Courts situate in the territories of any Native Prince or State in alliance with His Majesty and not established or continued by the authority of the Governor-General in Council, or any class of such decrees, may be executed in British India as if they had been passed by the Courts of British India;" and as a notification has been issued under that section declaring that the decrees of the Cochin Courts may be executed in British India, the decree cannot be impeached on the ground that the Court which had passed it had no jurisdiction to try the suit, this being the rule applicable to decrees passed by Courts in British India itself. Stress is laid on the words "as if they had been passed by the Courts of British India". Attention is also drawn to Order XXI, R. 7, which enacts that, when a decree is sent by one Court in British India to another for execution the latter Court shall cause the copy of the decree and the certificate of the transmitting Court to be filed without any further proof of the decree or order for execution, or of the copies thereof, omitting the proviso to S. 225 of Act XIV of 1882 that further proof should not be required of the jurisdiction of the Court which passed the decree. I abstain from expressing any opinion on the effect of the omission of the words referred to, as Order XXI, Rule 7 is obviously applicable only where a decree is transferred by one British Court to another for execution and does not apply to foreign decrees transmitted to a British Court for execution. There is nothing in section 44 to make it applicable to the latter class of decrees, though the ordinary rules of evidence may allow the decree or order for execution or copies thereof to be proved in much the same manner as similar documents relating to Courts in British India. Section 47 of the Civil Procedure Code has also been referred to in support of the argument that the jurisdiction of a native Court passing a decree sought to be executed in British India cannot be impeached in execution

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proceedings in the British Court in the same manner as the jurisdiction of a British Court which passed the decree cannot be impeached in execution proceedings. I am not prepared to assume that in no case can the validity of a decree be impeached in execution proceedings when it is passed by a British Court. Can a decree which directs an act expressly forbidden by the legislature on grounds of public policy without any question being raised whether such a direction could be made or not be said to be unimpeachable in execution? It is, however, unnecessary in my opinion to decide in this case whether the rule contended for is one of universal application as I think that S. 47 is not in terms applicable to a decree of a foreign Court. I agree with the opinion of Farran J. in *Haji Musa Haji Ahmed* v. *Purmanand Nursey*[1] that S. 44 had not the effect of converting a foreign decree into a decree of a British Court but merely sanctions a new procedure for the enforcement of such a decree. The decree still remains a foreign decree. S. 47 is not a provision relating merely to the procedure to be observed in the execution of a decree. It lays down a rule of jurisdiction and forbids any question relating to the execution, discharge or satisfaction of a decree being determined otherwise than in execution proceedings. Except for this section, there would be nothing to prevent the enforcement of a decree by instituting a suit on it. The section also empowers and requires the executing Court to decide every question relating to the execution of a decree and is in this aspect also one relating to the jurisdiction of the executing Court. On the other hand, S. 44 of the Evidence Act, as pointed out by Farran J., lays down the general principle that a party to a suit or other proceeding may impeach the validity of a judgment or decree on the ground that it was obtained by fraud, no exception being made of cases in which the judgment or decree is relied on for the purpose of execution. There can be no doubt, I think, that on general principles there are some cases where a judgment or decree even of a British Court may be impeached on the ground of absence of jurisdiction in the Court which passed it. There seems to be no reason why, on general principles, where a foreign decree is sought to be executed

1. (1890) I. L. R. 15 B. 216,

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in a British Court, any proper exception should not be taken to it. S. 47 is in my opinion not applicable to such a case, and there is nothing else to prevent an objection to jurisdiction from being raised. I am of opinion that the language of S. 44 Civil Procedure Code does not compel a British Court to grant execution of a decree of a Native Court. The language of the section is permissive in form; it does not empower the Governor-General-in-Council to direct that such a decree shall in all cases be executed by British Courts.

It is contended that it is obligatory on the Courts to exercise the power when a notification has been made by the Governor-General in Council and that the word "may" should be read as meaning "shall." This question was also considered by Farran J. *in Haji Musa Haji Ahmed* v. *Parmanand Nursey* [1], and I agree in the conclusion arrived at by the learned Judge. As pointed out in *Julius v. Lord Bishop of Oxford* [2], the word "may" in reality always imports only permission and confers only a discretionary power on the Court to exercise the jurisdiction conferred on it. According to Lord Cairns it does not of itself do more, but the discretion conferred on a Court is not an arbitrary one. The intention of the legislature must be taken to be that the power should be exercised if certain facts exist or certain conditions are satisfied. These facts and conditions are not always expressed in the statute itself. Where they are not expressed, they have to be ascertained by the Court invested with the power. Lord Cairns observes :—"But there may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed, to exercise that power when called upon to do so." If the Court fails to exercise the power when the conditions for its exercise exist, a superior Court may set aside its order, if it comes to the conclusion that the facts or conditions making the exercise of the discretion proper in reality exist in the case. Sometimes the ascertainment of the facts or conditions is left to

1. (1890) I. L. R. 15 B. 216. 2. (1880) L. R. 5 A. C. 214.

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the Court on which the power is conferred, appropriate language being used for the purpose. Even then it would be obligatory upon the Court to form its judgment on the question whether the facts or conditions exist and not arbitrarily to refuse to exercise its discretion ; and if it fails to do so, it may be corrected by a superior tribunal. If the conditions for the exercise of the power are laid down in the statute itself, then the Court has to do nothing more than to ascertain whether they have been fulfilled, and, if it comes to the conclusion that they have been, it is bound to exercise the power. Lord Penzance observes : " It is surely not enough that the thing empowered to be done should be for the public benefit, in order to make it imperative to exercise that power on all occasions falling within the statute. It may be assumed that all powers conferred by statute on individuals in general public Acts are for the public benefit, or they would not have been conferred." The learned Judge was of opinion that there was no authority for the proposition that such words as 'it shall be lawful' in a certain class of statutes import *prima facie* not permission but obligation, and that the effect of the cases in which the exercise of the power conferred was held to be obligatory was that, though " the statute in terms had only conferred a power, the circumstances were such as to create a duty" and to show the exercise of any discretion by the person empowered could not have been intended in the particular circumstances of the case. Lord Selborne expressed the same view and observed that " the question whether a Judge, or a public officer, is bound to exercise a power conferred on him upon any particular occasion or in any particular manner, must be solved apart from the use of the word ' shall,' or words, ' it shall be lawful ' and, in general it is to be solved from the context from the particular provisions or from the general scope, of the enactment conferring the power." Lord Blackburn stated that the enabling words gave a power which *prima facie* might be exercised or not, " but if the object for which the power is conferred is for the purpose of enforcing a right, there may be a duty cast on the donee of the power to exercise it for the benefit of those who have that right, when required on their behalf.

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Where there is such a duty, it is not inaccurate to say that the words conferring the power are equivalent to saying that the donee must exercise it." But he could not agree with the view that, whenever the statute is for the public good, and of general interest and concern, powers conferred by enabling words are, *prima faice*, to be considered powers which must be exercised.

In *Re Baker Nicholas* v. *Baker* [1], and *In re Johannesberg Land and Gold Trust Company* [2], the same view was taken. No doubt, when a power is conferred on a Court for the benefit of those who wish to enforce their rights against others, it cannot refuse to exercise it without good grounds; adequate reasons must be found for holding that it is not bound to exercise it. The reason is sometimes to be found in the pre-existing state of the law. See *The Queen* v. *Bishop of Oxford*, [3]. In *Re Newport Bridge* [4], where the question was whether the Court of Quarter Sessions was bound to direct the widening of a bridge, it was held that, having regard to the nature of the Court entrusted with the power and subject-matter which involved other considerations besides the width of the bridge such as the cost of the proposed work and its possible disproportion to any public benefit likely to be derived from it, it was discretionary to make the order or not.

Now, S. 44 does not itself lay down any rule for the guidance of the Court to decide in what cases the decree of a Native Court should be allowed to be executed in a British Court. In arriving at a conclusion on the question whether the right to obtain execution of such decree is an absolute one and whether no discretion was intended to be exercised by a British Court called upon to allow execution, it is proper and necessary to consider the nature of the right obtained by a litigant by virtue of a judgment of a foreign Court. Such a right, so far as its enforceability in a British Court is concerned, is not an absolute one. It cannot be doubted that, if a suit were instituted on the judgment, it could be impeached on various grounds set out in S. 13 of the Civil Procedure Code. According to Act XIV of 1882, even the conclusion in the Judgment of an Asiatic or African Court on the merits could be attacked. But the provision has

1. (1890) 44 Ch. D. 262.
2. (1892) 1 Ch. 583.
3. (1879) 4 Q. B. D. 525.
4. (1861) 2 E. and E. 377.

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been abrogated in the present code. I have no doubt that a suit is still maintainable on the judgment of a Native Court. See *Sama* v. *Annamalai* [1] *Gurdyal Singh* v. *Raja of Faridkot* [2], *The Collector of Moradabad* v. *Harbans Singh* [3], and *Haji Musa Haji Ahmed* v. *Parmanand Nursey* [4]. The Bombay High Court no doubt held in *Bhavani Shankar Shevakran* v. *Pursadri Kalidas* [5] and *Himmatlal* v. *Shivajiri Rav* [6], that no suit could be maintained on the judgment of a native state in India even where no provision was made for its enforceability by execution. In *Mayaram* v. *Ravji* [7] however, that Court has held that this view could no longer be maintained, whatever room for doubt might have existed before the enactment of S. 14 of Act VII of 1888. The jurisdiction to entertain a suit on a judgment of a native state is in my opinion in no way affected by allowing the judgment to be enforced by execution in British Courts. Such jurisdiction cannot be affected by an enactment of a permissive character such as that laid down in S. 44. The period of limitation provided for a suit on a foreign judgment is 6 years according to Article 117 of schedule I to the Limitation Act, while the limitation applicable for taking out execution would be different. I have already stated that S. 47 of the Code cannot have the effect of barring such a suit. I can see no reason for considering that the legislature intended to confer a greater virtue on a foreign judgment when it is sought to be enforced by execution than when a suit is instituted to enforce it. Whatever objections may be raised to it in the one case should be equally available in the other. It would not be reasonable to hold that it was intended to empower the Governor-General in Council by an executive act to give a larger obligatory force to a foreign judgment than it would ordinarily possess. If such were the intention, provision would have been made to enable that authority to do so, whether the judgment is sought to be enforced by a suit or by execution. Taking the previous state of the law and the language of S. 44 into consideration, I am of opinion that the object of S. 44 was merely to provide a more expeditious method of enforcing the judgment of

1. (1883) I L R 7. M. 164 2. (1894) 1. L. R. 22 C. 222.
3. (1898) I. L R. 21 A. 17. 4. (1890) I. L. R. 15 B. 216.
5. (1882) I. L. R. 6. B. 292. 6. (1884) I. L. R. 8 B. 593.
7. (1899) I. L. R. 24 Bom. 86.

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a native state and not to enhance its value or obligatory force. What then is the proper course, when an application is made for the execution of a decree of a native state open to one or the other of the objections mentioned in S. 13 of the Civil Procedure Code? Having regard to the language of S. 13, it appears to me that it might be open to the Court simply to refuse execution without deciding whether the party would be entitled to enforce the judgment by a suit or not. This was the course adopted by Farran J. in *Haji Musa Haji Ahmed* v. *Parmanand Nursey* [1]. I think it is also open to the Court to consider whether any good ground for the non-exercise of the discretion exists by examining the question whether any of the objections stated in S. 13 makes the judgment invalid and to determine finally whether it is enforceable in a British Court or not; at any rate it is clear to my mind that it is not open to the Court to grant execution when it finds that a valid objection to the decree is made out. Inasmuch as in this case the Cochin Court had no jurisdiction to pass the decree sought to be executed, I am of opinion that the District Munsif was right in refusing to allow execution and that the Subordinate Judge's order reversing it cannot be supported. I would, therefore, set aside his order and restore that of the District Munsif with costs here and in the Lower Appellate Court.

As my learned brother is of a different opinion, the appeal is dismissed with costs.

Sadasiva Aiyar, J:—The question of law argued in this case is no doubt of great importance. It is unnecessary for me to set out the facts as they have been fully mentioned in the judgment of my learned brother. The District Court of Trichur in the native state of Cochin passed a decree for money. The Governor-General in Council had under S. 229 (b) of the old Civil Procedure Code (present S. 44) declared by notification in the Gazette of India that the decrees of the Cochin Courts may be executed in British India as if they had been passed by the Court of British India. The decree-holder (respondent) had a decree of the Cochin Court transferred to the Palghat District Munsif for execution with the necessary

1. (1890) I. L. R. 15 B. 216.

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papers *viz.*, copy of the decree and certificate of non-satisfaction. The Palghat Munsif instead of executing the decree went into the question of the jurisdiction of the Trichur Court and refused execution. The short question for disposal therefore is whether a Court in British India to which a decree of the Civil Court of a Native State is sent for execution can go into the question of the jurisdiction of the Court of the native state passing the decree, when the Governor-General in Council has by notification, declared that the decree of the native state Court may be executed as if it had been passed by a Court in British India.

In the decision of this question, the consideration of the point whether a suit can be brought in a Court in British India on the judgment passed by a Court of a native state is probably not of much use. I shall, however, consider that question, as it was argued at the bar, but I wish to state that my present opinion on this question is not held very strongly. In *Bhavani Shankar Shevakram* v. *Purusadri Kalidas*[1] it was laid down very broadly that such a suit will not lie, whether the decree passed by the Native State was executable in British India by reason of the notification of the Governor-General or whether it was not so executable by reason of the absence of such a notification. So far as that judgment lays down that a suit will not lie on the judgment of the Court of a native state even where the decree is not executable by a British Indian Court owing to the absence of a notification by the Governor-General in Council, that opinion must be held to be erroneous as the Privy Council have held in *Gurdyal Singh* v. *Rajah of Faridkot*, [2] that an action can be brought in the British Indian Courts upon a judgment of a native state. Where, however, the British Indian Courts could execute a decree of the Court of a native state as if it had been passed by a Court in British India, can a decree-holder bring also a suit upon that judgment in British India and obtain another decree in British India? Can he be allowed to have two decrees executable in British India, one passed by the Court of the native state and the other passed in British India upon the judgment of the Court of the native state? I am inclined to think that when by a notification of the Governor-

1. (1882) I. L. R. 6 B. 292. 2. (1894) I. L. R. 22 C. 222 at 237.

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General in Council, the decrees of the Courts of particular native states are made executable in British India as if they had been passed by the Courts in British India itself, a separate suit cannot be brought in British India upon the judgment of the Court of such a native state. It is clear that upon the judgment of a Court in British India, a fresh suit could not be brought in British India, the only course for the decree-holder being to execute the decree he has obtained. That the judgment of the Court of a native state should be put upon a better footing than the judgment of a British Indian Court could not have been the intention of the Legislature. I shall quote a few sentences from the judgment in *Bhavani Shanker Shevakram* v. *Purusadri Kalidas*,[1] :—"Some Courts in native states may be sufficiently well constituted, and their proceedings sufficiently well conducted, to entitle their judgments to respect; but this is notoriously not so in regard to other states, and indeed must be regarded as the exception rather than the rule. Our Courts are not in a position to draw distinctions, which would necessarily be invidious, and not necessarily correct, between the Courts of different native states. S. 434 of the Code of Civil Procedure" (the old Code of 1877) "imposes this duty upon the Governor-General in Council, *who is certainly the best informed and therefore the fittest authority to discharge it*.............We think that it was clearly the intention of the legislature that the decrees of the privileged Native Courts should occupy the same position as the decrees of British Courts, and *should not carry with them any greater advantages*." "If therefore a suit would not lie upon the judgment of one of our own Courts" (in the same Court or in another British Indian Court) "neither is there reason to suppose that it will lie upon the judgment of one of the privileged Native Courts." As regards non-privileged native state Courts, as S. 13 of the Civil Procedure Code allows a British Indian Court to go into the question of jurisdiction and the question of conformity to natural justice, of equity and so on, there can be no objection to allow a suit in the Courts of British India upon the judgments of Courts of *non-privileged native states.* So far as the privileged native states are concerned, their judgments and decrees were clearly intended

1. (1882) I. L. R. 6 B. 292.

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by the legislature to be put on the same footing as the judgments and decrees of Courts of British India. In *Sama* v. *Annamalai* [1] Hutchins J said "It is a greater privilege to be able to execute a decree than to be able to enforce it by another suit; and section 14" (present section 13) "seems to show that there are many grounds upon which a foreign judgment may be impeached in a suit, which could not be pleaded in execution proceedings." It is well known that the British Residents appointed to Cochin, Travancore and other states have got large powers of effective advice, that the Courts established in Cochin and Travancore are presided over almost wholly by Bachelors of Laws of the Madras University, that their laws relating to civil rights and procedure cannot be said to be appreciably less enlightened (taking them as a whole) than those obtaining in British India and as regards the Mysore State it is well known that very many of the laws passed and being passed by the British legislature in India have come and are coming into force in that state almost automatically. The Governor-General in Council, who is the best and safest authority on the question whether justice is dealt with in any native state practically in as safe and regular a manner as in British India and whether therefore the decrees of the Courts of such a native state could be given, as regards the privileges of execution by Courts in British India, the same position as decrees passed by Courts in British India itself has been given by the legislature the power to declare the existence of that position and those privileges. I may add that, though under the definition of a "foreign Court' under S. 2 cl. 5 of the Civil Procedure Code, the Court of a native state is a 'foreign Court', a native state cannot be called foreign territory in the sense that France, Germany or Japan is foreign territory. It is further significant to note that while S. 44 of the Code (old section 229 (*b*), allows the Governor-General in Council to give the privilege for the purposes of execution to the decrees passed by a Court of a native state, it does not allow the Governor-General in Council to give the same privileges to the decrees of Civil Courts passed by tribunals situated in really foreign territory such as France, Germany or Japan. Native states may not be British India technically, but for many pur-

1. (1883) I.L.R. 7 M. 164.

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poses they might be called, without stretch of language, British India because they are part of India under British suzerainty. The rulers of native states are surely not independent sovereigns. Sir George Campbell said in his Modern India that "Nepal alone retains any remains of independence." None of them could make wars or alliances, and the British Goverment takes a paternal interest in the good Government of the states, even deposing rulers when the welfare of suffering millions and the incapacity of the rulers to effect necessary reforms in their states clearly demanded such deposition. (See the case of the Gaekwar of Baroda in 1875 and the ruler of Mysore in 1831). These native states are protected dependent states under the suzerainty of the British Government, and the great jurist, Austin, says that no Government can be styled with propriety half or imperfectly supreme. The inhabitants of native states cannot be treated as separate nations and therefore subjects of international law. In most of these states, the postal, telegraph, and railway services are *practically* British, as well as the coinage. However, as Lee Warner says, it must be admitted that there are dangers in " inconvenient precision" and in "premature inferences", and it is wiser to "leave undefined" the precise position of native states, which position, though not expedient to clearly explain, is practically understood. When the Mysore State was regranted to an Indian Ruler, there were the following among numerous other stipulations. "The Maharajah shall at all times conform to such advice as the Governor-General in Council may offer him with a view to the management of his finances, settlement and collection of his revenues, the imposition of taxes, the administration of justice, the extension of commerce, the management of trade, agriculture and industry and any other objects connected with the advancement of his Highness's interests, the happiness of his subjects and his relations to the British Government." All the native states are subject to restrictions as to the strength of their armies, as to recruitments and as to equipments and are subject to the exercise of British rights of occupation and cantonment, to assist in procuring supplies for armies, to extradite deserters and to submit to Imperial control over railways, telegraphs and postal communications. In fact, they have lost

their international life and they cannot negotiate with each other. I would put it thus (using the language of other writers without acknowledgment) :—The great settlements made by Lord Hastings with several native states created a constitutional tie between them and the British Government. The position of King and Nobles in early English history presents incidents in common to that of the supreme Sovereign in India in relation to the Rulers of Native States. Such powers as the Chiefs exercise, they owe to British Policy, although the Courts have been declared to be beyond British India. The Manipur case established "that both native rulers and their subjects owe allegiance to the King-Emperor." When the Governor-General in Council chooses to give the Courts of a privileged native state, the high and coveted status of equality with the courts established in British India, owing to the enlightenment of the Native States and the reputation for dealing out equal justice acquired by such Courts, why should Courts in British India be astute to defeat the policy of the legislature by refusing to give as much privileges to the decrees of the Courts of such a privileged Native State (so for as execution is concerned) as the legislature clearly intended to give them ?

We could entertain very little doubt that the policy and the object of our Government is to bring up the laws and the rules of procedure in the dispensation of justice in native states to the level of the laws and legal procedure obtaining in British India and to gradually unite the subjects of native states (who are also subjects of the King-Emperor) and the subjects of the British Emperor in British India in ever closer bonds of fraternal union. The British Government protects and gives passports to subjects of native states abroad as if they were subjects living in British India (see paragraphs 99 and 100 of Lee Warner on The Protected Princes of India, chapter 9). It would, in my opinion, be going clearly against the beneficient policy and the clearly expressed wish of the Government if any narrow construction were put upon the duty of British Indian Courts to execute the decrees of the Courts of privileged native states.

Then it was argued that section 44 merely says that the decrees of the Courts of such privileged native states may be

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executed in British India as if they had been passed by the Courts of British India, but the section does not say that such decrees shall be so executed, and reliance is placed on *Haji Musa Haji Ahmed* v. *Parmanand Nursey*[1] the judgment of a single judge. With the greatest deference, however, I am unable to agree that after the Governor-General has made a notification under section 229 (b) of the old Code (present section 44), a Court in British India is at liberty to refuse to execute the decree of the Court of a privileged native state on any grounds *other than those for which it can refuse to execute a decree of a Court in British India itself transferred to it for execution.* The word 'may' is sometimes used to give a discretion to Courts, but it is also sometimes used merely to show that the Courts are given the jurisdiction to exercise a power and not to give them a discretion to decline to exercise the jurisdiction granted to them. As said by Lord Blackburn in *Julius* v. *Lord Bishop of Oxford*, [2] enabling words are always compulsory where they are words to effectuate a legal right. Maxwell in his interpretation of Statutes quotes the following instances.

(*a*) A statute enacted that churchwardens and overseers shall have "power and authority" to make a rate to reimburse parish constables certain expenses; the court held that it was obligatory on them to make it when the expenses had been incurred.

(*b*) Whether a statute enacted that justices shall, if they shall so think fit examine accounts delivered to them, it was held that the justices could not decline to enter upon the examination.

(c) The Weights and Measures Act, 1889, provided that an inspector " *may* take in respect of the verification, etc......... fees specified," it was held that the inspector was bound to take the fees in all cases.

(*d*) 11 and 12 Vict. C 42 enacted that justices *may* issue a summons on an information laid before them, *only if they shall think fit.* It was held that they were not at liberty to refuse it on the mere consideration that the law would operate unjustly in the particular case.

1. L. R. (1890) 15 B. 216. 2. L. R. 5. A. C. 214.

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(*e*) A charter which granted to the steward and suitors of a manor "power and authority" to hold a Court to hear civil suits, was held to make it obligatory to hold it when necessary.

(*f*) A statute which enacted that the Chancellor 'should have full power' to issue a commission of bankruptcy against a bankrupt trader on the petition of his creditors was held to imperatively require the issue of such a commission and it was held that 'may' was in effect 'must.'

(*g*) Under the County Courts Act, it was enacted that the Superior Court may give the plaintiff the costs of his action if he lived more than 20 miles from the defendant. It was held that the Court was bound to give them in every case in which the plaintiff and the defendant dwelt more than that distance apart.

(*h*) So where the Arbitration Act of 1889 held that the Court may on the application of a party appoint an arbitrator, it was held that it was obligatory on the Court to make an appointment as applied to.

I think it is unnecessary to multiply instances and the principle seems to be clear that, where a Court is empowered to do an act for the benefit of a party on application, it is bound to act on such application, unless it is expressly stated in the enactment that for some particular reasons or under particular circumstances, the Court may refuse to exercise its jurisdiction and power. I am, therefore, clear, notwithstanding the high authority of Farran J. in *Haji Musa Haji Ahmed* v. *Parmanand Nursey* [1] that the word 'may' in S. 229 (b) has the same force as the word shall'. I might further add that, even if the Court is held to have a discretion to execute the decree or not, if that discretion has been exercised by the Appellate Court (as in this case) in favour of the decree-holder, I do not think it necessary or advisable that we should interfere in second appeal with the exercise of that discretion. If it had *refused* to exercise that discretion, we might, in the interests of the decree-holder, who is intended to be favoured by the statute, properly interfere but I do not think that it is advisable to interfere to the prejudice of the decree-holder in whose favour the lower Court in its discretion had allowed execution.

1. (1890) I L. R. 15 Bom. 216

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The question therefore is now narrowed to this. Can a Court in British India to which a decree of another Court in British India has been transferred for execution refuse to execute the decree on the ground that the Court which passed the decree had no jurisdiction? Under the old S. 225, there was a conflict of opinion on this point. But the new Order XXI, Rule 7 omitted the words "or of the jurisdiction of the Court which passed it" which were found in the old S. 225 and the presence of which words in the old section gave rise to a conflict of decisions. Why were these words omitted? The learned commentators, Woodroffe and Ameer Ali, who have commented upon the Civil Procedure Code, say that those words were omitted "as it was considered that another Court ought not to go into any question as to the jurisdiction of any Court which passed a decree." The same view is enunciated in Cowdell's Code in the commentaries to Order XXI, Rule 7. O'Kinealy and Rampini in their very short notes ignore the significant omission of the words referring to jurisdiction and have fallen into the error of saying that Order XXI, Rule 7 recognises the right of the executing Court to inquire into the jurisdiction of the Court which passed the decree, and quote in support of their view some of the cases decided under the old code.

I think the matter is made absolutely clear by the unanimous report of the select committee (which included Messrs. H. E. Richards, Rashbehary Ghose, Madho Lal, and S. Ismay) dated the 14th February 1908 and published in page 39 et. seq. at Part III of the Fort St. George Gazette of the 3rd March 1908. At page 41, the select committee states as follows:

"Order 21, Rule 7". The words "or of the jurisdiction of the Court which passed it" have been omitted. In our opinion a Court executing the decree of another Court ought not to go into any question as to the jurisdiction of the Court which passed it."

It being thus clear from the new Code that the Court to which a decree is sent for execution cannot go into the question of the jurisdiction of the Court which passed the decree, if the decree of the privileged native state Court is on the same footing as if it had been passed by a British Indian Court so far it is executable by a Court in British India, it is clear to my mind,

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that the executing Court in British India cannot go into the question of jurisdiction. There is no greater hardship to the judgment debtor in the adoption of this view as regards the decree of a privileged native state Court than in the case of the decree of a British Indian Court. The judgment debtor against whom a decree has been passed by British Indian Court without jurisdiction can have it set aside by proceedings in appeal, review and so on. The judgment-debtor under the decree of a privileged native state Court could have it set aside by similar proceedings in appeal, review etc., and in the same way. He has got exactly similar remedies which he can pursue in the Courts of that state.

For all the above reasons I am of opinion that this civil miscellaneous second appeal should be dismissed with costs.

[Under S. 15 of the Letters Patent an appeal was preferred against the Judgment of the Honourable Mr. Justice Sadasiva Aiyar.]

K. S. Pandalai for *S. Swaminathan* for Appellants.

The question turns on the construction of Ss. 44 and 47 of Civil Procedure Code. The Cochin Court is a foreign Court and its judgment a foreign judgment within S. 2, cl. (5) and (6) Civil Procedure Code. Under S. 44 a decree of the Cochin Court "may be executed as if" it had been passed in British India.

[*Wallis, C. J.* Is it not the intention of the legislature to put the decrees of these favoured Native Courts in the same footing as those of British Indian Courts?]

No. S. 44 has not the effect of converting a foreign decree into a decree of a British Court. S. 44 merely sanctions a new procedure regarding the manner and machinery of execution. See *Haji Musa Haji Ahmed* v. *Purmanand Nursey* [1]. The judgment of a favoured Native State under S. 44 is a foreign judgment and can be sued on in a British Court.

[*Ayling J.* Does a suit lie on a judgment of a British Indian Court? If not, the judgments of favoured Native States under S. 44 must be treated likewise.]

1. (1890) I. L. R. 15 B. 216.

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In the case of decrees of British Courts S. 47 is a bar to a suit. Under S. 47 the executing Court has exclusive jurisdiction to determine all matters relating to execution *etc.* S. 47 does not apply to decrees of foreign Courts, though notified under S. 44. A foreign judgment can be sued upon in a British Court. See *Gurdyal Singh* v. *Raja of Faridkot* [1].

[*Wallis C.J.*: What is your construction of the words "may be executed as if they were passed"?]

I emphasise the word *executed.* S. 44 merely extends the procedure applicable to execution of decrees of British Courts to certain foreign decrees. It does not do away with the right of suit on a foreign judgment. The words of S. 44 should be construed in their narrowest sense. Otherwise even if a foreign Court acts without jurisdiction, British Courts will be bound to execute its decree if it comes under S. 44. General words in a statute must be narrowed down to avoid abrogation of well known principles of law. See *Cooke* v. *Charles A Vogeler Company* [2], and *Ex parte Blain* [3]. Maxwell on Interpretation of Statutes, pp. 122, 188, 218.

But for S. 47 even a decree of a British Court can be sued on and any objection to the jurisdiction of the Court which passed the decree may be taken. S. 47 does not apply to decrees of foreign Courts.

[*Wallis C. J.* In effect you say that S. 44 is subject to the provisions of S. 13.]

Yes. If a suit is brought on the judgment of the Cochin Court I can take objection to its jurisdiction. I can do the same when it is sought to be executed in a British Court.

In this case the defendant was not in Cochin at all, nor a subject of that State. The Cochin Court had no jurisdiction to pass a decree against him. See *Gurdyal Singh* v. *Raja of Farid-Kot* [4]. Dicey on Conflict of Laws p. 357.

C. V. Ananthakrishna Aiyar for Respondents.

Even if the Cochin Court had no jurisdiction, there was in this case a submission to jurisdiction on the part of the appellant.

1. (1894) I. L. R. 22 C. 222. (P.C.)
2. (1901) A. C. 102.
3. (1879) 12 Ch. D. 522.
4. (1894) I. L. R. 22 C. 222. (P.C.)

[*Wallis C. J.* He protested against jurisdiction].

But he pleaded to the merits also. That is submission to jurisdiction. See Dicey 'Conflict of Laws' p. 370 Rule 83. Where the defendant appears and contests both on the merits and on jurisdiction there is submission. See *Boissiere* v. *Brockner* [1].

[*Wallis C. J.* In that case the defendant pleaded to jurisdiction and if unsuccessful on that plea *asked* for a judgment on the merits].

Appearance under protest is none the less a voluntary appearance. Halsbury Vol. 6, p. 285. Westlake's Private International Law pp. 376 and 377 *Voinet* v. *Barrett* [2]. 54 L.J.Q.B. 521, where the defendant voluntarily appears and takes the chance of a judgment he cannot afterwards protest. See *Schibsby* v. *Westenholz* [3].

[*Seshagiri Aiyar J.* There is no question of protest to jurisdiction in that case].

Appearance without duress is submission to jurisdiction. See American Cyclopædia Vol. 23.

Contesting on the merits and taking the chance of a judgment in one's favour (as in this case) amount to submission. Foote's Private International Law p. 552; Dicey on Conflict of Laws p. 370; Westlake page 377; Piggott on Foreign Jurisdiction Vol. I, Part I, p. 352. *Kandoth Mammi* v. *N. Abdukalandan* [4], *Shaik Atham Sahib* v. *Davud Sahib* [5], *Harchand* v. *Gulab Chand* [6], on the merits, I submit that there is difference between a suit on a judgment and the execution of a decree. See Dicey page 422. A suit on a judgment is a suit on a contract of which the judgment is the evidence. Execution of a decree is only carrying out the order of a court. In the case of foreign Native States notified under S. 44, no suit will lie on the judgments of those courts. The British Courts are merely to execute such decrees as if they were decrees of British Courts. Inquiry into jurisdiction is forbidden by O. 21, R. 7 in execution. It is a greater privilege to execute a decree than

1. (1889) 6 Times L. R. 85.
2. (1885) 55 L. J. (Q. B.) 39.
3. (1870) L. R. 6 Q. B. 161.
4. (1875) 8 M. H. C. R. 14.
5. (1909) I.L.R. 32 M. 469.
6. (1914) 16 Bom. L. R. 620.

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to be able to enforce it by suit. Decrees of foreign States not notified under S. 44 can be enforced by suit. Where then is the privilege conferred on states notified under S. 44, if their decrees also have to be enforced by suit. The new Code makes it clear that execution is the only way in which decrees of Native States notified under S. 44 can be enforced in British India. In such a case the British Court cannot go behind the decree and question the jurisdiction of the court passing it. See *Sama* v. *Annamalai* [1], *Hari Govind* v. *Narsing Rao Konherrao* [2]. *Haji Musa Haji Ahmed* v. *Purmanand Nursey* [3], is no longer of authority.

Pandalai (in reply) My appearance was not voluntary but under duress. I had timber in Cochin which I was prohibited by an injunction from removing by the Cochin Court. Appearance to protect property seized by the Court is appearance under duress. It is not submission to jurisdiction. *Boissiere* v. *Brockner* [4], was not a case of a person appearing to protect property. In this case the decision on jurisdiction and decision on the merits were given at the same time. I could not have withdrawn earlier from the suit. Therefore there is no submission.

The Court delivered the following

Judgments:—*The Offg. Chief Justice*:—The learned Judges have differed on the question whether the District Munsif was right in refusing to execute the decree of the Cochin Court, as to which a notification has been issued pursuant to S. 44 C. P. C. on the ground that it was passed without jurisdiction. It was not disputed that in the circumstances which were similar to those in the *Faridkote case* the Cochin Court must be considered to have had no jurisdiction, but it was contended that a British Court was bound under the terms of the section to execute it, as if it has been passed by a Court of British India, and that it would not now be open to a Court in British India to refuse to execute the decree of another Court in British India for want of jurisdiction. I do not think it necessary to consider the second proposition, because I agree generally with the Judgment of *Sundara Aiyar J.* that S. 44 has not the effect contended for, and that a British Court ought not to execute a decree of the Cochin

1. (1883) I. L. R. 7. M. 164.
2. (1913) I. L. R. 38 B. 194.
3. (1890) I. L. R. 15 B. 216.
4. (1889) 6 T. L. R. 85.

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Court passed without jurisdiction. That judgment is a judgment of a Foreign Court within the meaning of S. 13 C. P. C. and it would in my opinion require much plainer words than are to be found in S. 44 to show that it was the intention of the legislature that decrees of foreign Courts to which S. 44 applies should be enforced in British Courts without regard to the provisions of that section. Full effect may be given to S. 44 by holding that it was merely intended to alter the procedure by which such a foreign judgment can have effect given to it in British India. This was decided by *Farran J.* more than 20 years ago in *Haji Musa Haji Ahmed* v. *Parmanand Nursey* [1] which apparently has not been questioned in our courts until the present case, and was known to the legislature when the provisions of the last Code were revised and the present Code was enacted. The suggestion that the legislature intended all decrees of Courts in the position of the Cochin Court to be executed in British India without any question seems to me altogether inadmissible having regard to the way in which the question has been dealt with as regards the superior Courts in the United Kingdom. The Judgments of a Superior Court can only be executed in the Superior Court of another part of the United Kingdom under the Judgments Extension Act; 1868, when they are judgments for " any debt, damage or costs ". Such judgments are, it is expressly provided, to have the same force and effect after registration in the executing Court as if they were judgments of that court, words which are not to be found in S. 44 C. P. C. Further, S. 8 makes a significant exception in the case of decrees of the Court of Session " pronounced in absence in an action proceeding on an arrestment used to be found jurisdiction in Scotland ". In countries such as Scotland whose jurisprudence is based on the Roman law, jurisdiction against a foreigner may be founded on seizure of his property within the territorial limits, but English law does not recognise such a procedure except in the case of the custom of foreign attachment in the city of London (as to which see *Wadsworth* v. *The Queen of Spain* [2]) and the legislature has therefore thought proper to except Scotch decrees founded on such an arrestment and

1. (1890) I. L. R. 15 B. 216. 2. 17 Q. B. D. 171.

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obtained *in absentia* from the operation of the Act. The Inferior Courts Jurisdiction Act 1882 is also confined to judgments for any debt, damages and costs and only allows execution of judgments obtained in one part of the United Kingdom against defendants domiciled in another part. Subject to the restrictions as to cause of action and service contained in S. 10 of the Act it cannot I think have been the intention of the Indian legislature in S. 44 to ignore all these restrictions.

The next question is whether the defendant submitted to the jurisdiction of the Cochin Court. The Lower Appellate Court, returned a finding that he did not, and the respondent filed a memorandum of objections to the finding. Sundara Aiyar, J. observes that no attempt was made to impeach the finding at the hearing, but the learned vakil who appeared on both occasions assured us that this was a mistake and has addressed us an elaborate argument on the point. The law on this question cannot perhaps be considered to be fully settled. The decision in *Parry & Co.* v. *Appasami*[1] that it is enough merely to object to jurisdiction is probably no longer law. See *Boisserie* v. *Brockner*[2] and *Gniard* v. *De Clermont and Donner*[3]. There is however the high authority of Lord Esher, M. R. and Bowen, L. J. in *Voinet* v. *Barrett*[4] that submission is not voluntary in the language of Bowen L. J. in a case where goods belonging to the defendant have been seized by a foreign tribunal so that he only appears to get them released. In the recent case of *Gniard* v. *De Clermont and Donner*[3] where judgment has been given against the defendants in default of appearance and a small sum about £ 4 in a Paris Bank had been attached in execution, the defendants sought to set aside the default decree without any reference to the seizure of this comparatively trifling sum, and Lawrence J. held that it was not a submission for the purpose of saving property and held the judgment of the French Court was binding. Whether the submission was for the purpose of saving property or voluntary, is apparently a question of fact in each case. In the present case it is found that the plaintiff in May 1908 obtained an interim injunction restraining the defendant from disposing of the timber belonging to him in the Cochin state, and that in the following July the defendant filed a counter

1. (1880) I. L. R. 2 M. 407.
2. (1889) 6 T. L. R. 85.
3. 30. T. L. R. 511.
4. (1885) 55 L. J. Q. B. 39.

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petition for the removal of the injunction and a written statement denying the jurisdiction and raising a defence on the merits on the same day. On the above facts I think there was evidence to support the finding and am not prepared to interfere with it in second appeal. This appeal is allowed, the decree of the Lower Appellate Court is set aside, and the decree of the District Munsiff restored with costs throughout.

Ayling, J.—I agree.

Seshagiri Aiyar, J.—I agree. In order to decide the questions of law arising in this appeal, it is necessary to set out the facts which have been either found or proved. A suit was instituted in the District Court of the Cochin State against the appellant for damages for breach of contract. On the institution of the suit and before defendant appeared, an application was made for an injunction restraining the defendant from alienating certain logs of timber owned by the appellant and which were within the jurisdiction of the District Court. The order was issued and the notice of it was served on the appellant. It is not clear from the records whether this notice and the summons in the suit were served at the same time or on different dates. I find from the printed records that the appellant applied to have this injunction order vacated. There is nothing to show whether this application was prior to the filing of the written statement or after; unfortunately, the written statement has not been filed in the case. We have to gather its terms from the judgment of the Cochin Court. The summary of it in paragraph 2 of that judgment shows that the appellant took exception to the jurisdiction of the Court on the ground that he was permanently residing in British India, and also pleaded that he was not liable to the suit claim. The District Judge of Cochin overruled both the contentions and passed a decree against the appellant. This decree was sent to the District Munsif's Court of Palghat (in British India) for execution under S. 44 of the Code of Civil Procedure. Appellant contended before that Court that the decree of the District Court of Cochin was a nullity as it was passed without jurisdiction. The District Munsif upheld that plea. On appeal, the Subordinate Judge reversed this decision

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holding that it was not competent to the District Munsif to consider the question of jurisdiction. A Civil miscellaneous appeal was preferred against this order and the two learned Judges who heard it have differed.

The main contention of the appellant is that the decree of the District Court of Cochin does not by transfer to a British Court become a decree of the latter Court for all purposes. Mr. Pandalai contends that the words "as if they had been passed by the Courts in British India" relate only to the mode of execution and have not the effect of giving foreign judgments all the incidents of a judgment of a British Court. I agree with this contention. In my opinion S. 44 of C. P. C. is subject to the same limitations as are contained in S. 13 regarding foreign judgments. Under this latter section, the recognition of foreign judgments is not absolute but is subject to certain reservations. S. 44 introduces an exception in favour of certain Native States. The Governor-General in Council is empowered by that section, to give the privilege of execution to the judgments obtained in these states, without going through the process of instituting suits on them as is required in the case of other foreign judgments. The privilege is not an illusory one as Mr. Ananthakrishna Aiyar suggests. The favoured decree holder need not pay fresh Court fees for a suit. He need not go through the process of establishing his claim provided the conditions mentioned in S. 13 are complied with; and he can, on production of the decree take out execution. These are substantial advantages which the legislature has secured to the decrees of states which are included in the notification issued under S. 44 of the Code. I do not think that the legislature intended to obliterate the distinction between judgments of Native States and those of British India by the operation of S. 44. I think there is force in the contention of the learned Counsel for the appellant that the language of S. 44 does not *prima facie* import equality between the two classes of judgments. As Lord Halsbury points out in *Cox* v. *Hakes*[1], "it is impossible to contend that the mere fact of a general word being used in a statute precludes all enquiry into the object of the statute or the mischief which

1. (1890) L. R. 15 A. C. 506.

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it was intended to remedy". Lord Herschell also says "that for the purpose of construing any enactment it is right to look out only at the provision immediately under construction, but at any others found in connection with it, which may throw light upon it, and afford an indication that general words employed in it were not intended to be applied without some limitation". This principle has been accepted and acted upon in *Darlington Wagor Company* v. *Harding and Fronville Pier and Steamboat Company* [1], and *Ex parte Blain: In re Sawyers* [2]. In the present case we cannot impute to the legislature an intention to do away with the distinction between judgments of Native States and those obtained in British India thereby taking them out of the category of foreign judgments altogether. I have already indicated that substantial advantages would be secured even on the footing that S. 44 is controlled by S. 13.

It is not necessary for emphasising this position to hold that suits on the judgments of favoured Native States are not permissible under the Code. There have been conflicting views on this question. I am inclinded to think that both the remedies are open to persons who have obtained judgments in these states: However as this question has not been fully argued, I prefer not to express any decided opinion on it. Assuming that only execution is contemplated and not suit, still a judgment from the Native States included in the notification already referred to, must not be obnoxious to the qualifications contained in S. 13.

Another question which might be more decisive on the matter we have to decide was not also fully argued, and although I hardly feel any doubt upon it, I shall not base my decision on it. Mr. Ananthakrishna Aiyar contended that in regard to decrees obtained within British India, the executing Court will have no power to go into the question whether the Court which passed the decree had jurisdiction to decide it. He relied on the change in the language between S. 225 of the old Code and O. XXI, R. 7 of the new Code and quoted the recent decision of the Bombay High Court in *Harigovind* v. *Narsingrao Konherrao* [3] in support of his contention. I am not

1. (1891) 1. Q. B. 245. 2. (1879) 12 Ch. D. 522.
3. (1913) I. L. R. 38 B. 194.

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satisfied that the change is in favour of depriving the executing Court of the power to enquire into the jurisdiction of the Court which passed the decree. The words omitted suggest that the Court is not *suo moto* to require proof of jurisdiction. In my opinion the omission does not lead to the conclusion that it is not open to the contesting party to challenge the jurisdiction of the decree-court. I agree with Mr. Justice Sundara Aiyar that this conclusion is not warranted by the change in the language. The learned Judges of Bombay in the recent case do not refer to *Bhagwantappa* v. *Vishwanath* [1]. If jurisdiction can be questioned regarding judgments of British Courts, it would *afortiori* follow that judgments of Native States are not exempt from it. However as I said before, I shall not base my judgment upon this aspect of the case.

I feel no hesitation in holding that the words "as if they had been passed by the Courts of British India" have not the effect of giving foreign judgments the character of the judgments of our courts. In *Ramachandra* v. *Pitchaikanni* [2] it was held that similar words, in the Abkari Act had not the effect of giving arrears due under it the characteristics of arrears of Revenue under Act II of 1864. This was followed in *Kadir Moideen Marakkayar* v. *Muthukrishna Aiyar* [3] regarding Income tax where the language used is strikingly similar to the words in S. 44. The learned Judges held that the words "as if it were an arrear of Revenue," only related to the process of enforcing the Income tax dues. In 15 B. 216, the words in question were understood as relating only to the mode of execution. These decisions are directly in point. Mr. Anantakrishna Aiyar drew our attention to the language employed in Ss. 1 and 2 of 31 & 32 Vic. Chap. 54 (The Judgment Extension Act of 1868) and contended that the words in S. 44 are similar to those words and should be given the same meaning as in that Act. To my mind the language employed appears to be totally different. S. 1 speaks of the registry of Scotch Judgments in the English Courts and proceeds to say that they "shall from the date of such Registration be of the *same force and effect* (the italics are mine), and all proceedings shall and may be had and taken on such certificate, as if the

1. (1903) I. L. R. 28 B. 378. 2. (1883) I. L. R. 7 M. 434.
3. (1902) I. L. R. 26 M. 230.

judgment of which it is a certificate had been judgment originally obtained or entered up on the date of such Registration as aforesaid in the court in which it is registered." These words are very different from the language employed in S. 44 of our Code.

On the other hand, the language of S. 5 of 45 and 46 Vic. Chapter 31 bears a close resemblance to the words used in S. 44. The Act is known as the Inferior Courts Judgments Extension Act. Under this Act "process of execution may issue thereon out of the court in which the same shall have been so registered against any goods or chattels of the person against whom judgment shall have been obtained, which are within the jurisdiction of such last mentioned court, *in the same or the like manner* as if the judgment to be executed had been obtained in the court in which such certificate shall be so registered as aforesaid". Then follows S. 10 which exempts from the operation of S. 5 all judgments obtained against persons not domiciled within the jurisdiction of the court which passed it and against whom the whole cause of action has not arisen within its limits. This Act gives the clue to the meaning to be attributed to S. 44 of the Code of Civil Procedure and the limitation of S. 10 of that Act must govern our Code also.

Mr. Ananthakrishna Aiyar argued a further question which has not been considered by the learned Judges who heard the Civil Miscellaneous Appeal. The learned Vakil contends that as the appellant voluntarily submitted to the jurisdiction of the Cochin Court, he is estopped from questioning it in execution; the facts necessary for deciding this point have not been clearly elicited. The Subordinate Judge on remand found that there was no voluntary submission and Mr. Justice Sundara Aiyar says "the learned vakil for the respondent properly abstained from attempting to impeach it". Mr. Justice Sadasiva Aiyar does not refer to the question at all.

I have stated in the opening of my judgment the facts in so far as they are gatherable from the records. The question for consideration on these materials is, did the appellant voluntarily submit himself to the jurisdiction of the Cochin Court. It has been held in Madras that where a defendant demurs to the

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jurisdiction of a court and at the same time submits an alternative plea for a Judgment on the merits in his favour, he should not be deemed to have voluntarily submitted to jurisdiction. *Parry & Co.* v. *Appasami Pillai* [1]. This is also implied by the decision in *Sivaraman Chetti* v. *Iburan Sahib* [2]. In a very recent case it was held in Bombay *Hurchhand* v. *Golapchand* [3] that if in addition to challenging jurisdiction, the defendant takes the chance of a judgment being given in his favour, the submission is voluntary. The basis for this pronouncement is the decision of Cave J. in *Boissiere* v. *Brokner* [4]. The learned Judge says "where, however, he appears voluntarily and submits to the jurisdiction of the foreign court there arises a legal obligation to obey the judgment. The question I have to decide in this case is what is meant by the word "Voluntarily." For the plaintiffs it is contended that every appearance is voluntary which is not made under duress. For the defendants it is submitted that as the foundation for the legal obligation is consent an appearance under protest affords no indication of consent to the jurisdiction, or, in other words, is not voluntary. Now, no one supposes that when a man appears voluntarily as a defendant in an action before a foreign court he does so because he likes it, he appears because on the whole he deems it his interest to submit to have the dispute decided by the foreign tribunal and to take his chance of winning the suit: and if he enters into the litigation from those motives, intending to take advantage of the judgment if he wins, there is obviously a moral obligation on him to pay if he loses, and this moral obligation is recognised by our law as sufficient under the circumstances to constitute a legal obligation. If this is the true source of the obligation why should it not extend to the case of a man who appears without duress, and therefore voluntarily in one sense; but who accompanies his appearance with a protest and appears, not because he is compelled to do so but because he judges it to be for his interest to do so. That is, he intends to take all the advantage he hopes to gain by appearing and by a protest to relieve himself from the

1. (1880) I. L. R. 2 M. 407.
2. (1893) I. L. R. 18 M. 327.
3. (1914) 16 Bom. L. R. 620.
4. (1885) 6 T.L.R. 85.

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disadvantage. He wishes to have the benefit without the burden," and after discussing some of the authorities bearing on the question comes to the conclusion that the appearance of the defendant was voluntary notwithstanding the protest. Dicey (Conflict of Laws) accepts this as good Law. See case (2) in page 370; See also Foote on Private International Jurisprudence pages 552 and 553. I am not sure from the remarks of Westlake in his book on "Private International Law" that he is satisfied with the decision of Cave J (See Remarks at page 378). If the decision of this appeal however depended entirely upon this question, I would hesitate to follow the decision in 2 M. 407 although it may not be irrelevant to point out here that the conditions of existence in this country may not justify the application of the principle enunciated by Cave J. There are circumstances in this case which render it unnecessary to decide which of the two decisions (2 Madras series or 6 Times Law Reports) should be followed. There was an order against the appellant prohibiting him from alienating his properties which were within the jurisdiction of the Cochin Court. It was to protect himself from this order that he made his appearance, although he filed a statement on the merits as well. This amounts according to accepted authorities to appearing under duress. Lord Esher referring to the dictum of Blackburn J. in an earlier judgment says in *Vionet* v. *Barret* [1]. "This sentence clearly means that an appearance, which would otherwise be voluntary is not treated as voluntary if it is only made in order to save property which is in the hands of a foreign tribunal; that is to say if the appearance is made in a case in which property of the party so appearing is already in the foreign country and has been seized by the foreign tribunal before appearance has been entered, so that the party appears in order to save the property so seized, and in order to get it out of the hands of the foreign tribunal. Such an appearance is not treated as voluntary, because it is made in order to save property which is arleady in jeopardy in the hands of a foreign tribunal; but if a defendant enters an appearance before any property has been

1. (1885) 55 L. J. Q. B. 39.

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seized, such an appearance may be a voluntary appearance." Bowen L. J. is equally clear on the question. "It is true that a defendant does not do so in a case in which goods belonging to him have already been seized by a foreign tribunal, so that he only appears in order to get them released; but if his appearance is not a compulsory appearence, but is voluntary, then the matter stands in a different position". Cave J. in the case already referred to makes a reservation in favour of the defendant appearing under duress. Westlake says that this position is unassailable. He pleads for an extension of the doctrine to all cases where the defendant appears to protect his property in a foreign court, although there is no order for attachment or seizure of the same (See page 377). To the same effect are the opinions of other writers. Foote on Private International Jurisprudence page 552; Pigott on Foreign Judgments Vol. 1 page 349; Dicey on the Conflict of Laws (case 3 in page 372). The facts elicited in this case show that it was in order to protect his property that the appellant appeared before the court, and the fact that he subsequently invoked the opinion of the court on the merits should not preclude him from pleading that the Cochin Court had no jurisdiction over him.

I do not consider it necessary to deal with the question which has been considered by both the learned Judges at some length whether the use of the word *may* in section 44 is not equivalent to conferring powers to enquire into the competency of the judgment passed by a foreign Court. If the British Courts have a discretion what is to be the limit of its exercise? Are these courts to enquire into the merits to ascertain whether the judgment was a just one? If S. 44 is not controlled by S. 13, I do not think the use of the word *may* will give the British Courts power to deal with the jurisdiction of the Courts of Native States; nor am I prepared to hold that the use of the word *may* instead of *shall* was intended to subject S. 44 to the limitation contained in S. 13.

My conclusion is that the Courts in British India are competent to decide before issuing execution whether the Courts of a Native State had jurisdiction to pass the judgment which is sought to be enforced by them. I agree with the order proposed by the learned Chief Justice.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Ayling and Mr. Justice Napier.

Ravulapati Papi Reddi .. *Appellant** (*Defendant*)

v.

Nanduru Peda Venkatacharyulu .. *Respondent* (*Plaintiff*).

Papi Reddi *v.* Peda Venkatacharyulu.

Madras Estates Land Act (Act I of 1908), S. 3 (2) d—Jurisdiction of Civil Courts—Grant of Agraharam—Presumption as to grantee being not owner of Kudivaram at the time of the grant—Burden of proof.

In deciding whether a village falls within the scope of S. 3 (2) d of the Madras Estates Land Act there is *ab initio* no presumption that the grantees were not possessed of the Kudivaram at the time of the grant. This must be proved by the party alleging it.

The party who seeks to oust the jurisdiction of the Civil Courts must establish his right to do so.

Jagannadhacharyulu v. *Kutumbarayudu* (1) followed.

Second Appeal from the decree of the Court of the Temporary Subordinate Judge of Masulipatam in A. S. No. 70 of 1912 preferred against the decree of the Court of the District Munsif of Bezwada in O. S. No. 566 of 1910.

V. Ramdoss for Appellant.

P. Nagabushanam for Respondent.

The Court delivered the following

Judgment:—The first point for decision is one of jurisdiction which turns on whether the Agraharam in which the suit lands lie is an "estate" within the definition of S. 3 (2) d of the Madras Estates Land Act. If it is so, the jurisdiction of the Civil Court is ousted; but this has to be established by the party who seeks to oust the jurisdiction, in this case, the appellant (Defendant). He has to show in this case :—

1. That the original grant by the *Zamindar* was of the land revenue alone.

2. That the original grantee or grantees were not at the time of the grant possessed of the Kudivaram of the village.

3. That the grant was confirmed or recognised by the British Government.

There is no question about (3) and as regards (1) the circumstances in evidence justify the inference that the *Zamindar* only granted what he was himself possessed of : *i.e.*, the land

* S. A. No. 73 of 1913. 28th August 1914.

1. (14) 27 M. L. J. 233.

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revenue only. The difficulty is about (2). Appellant's Vakil admits that he has adduced no evidence on the point but he contends that the burden of proof has been wrongly thrown upon him. We must hold, following the decision in the latest case in *Jagannathacharyulu* v. *Kutumbarayadu* [1] that in deciding whether a village falls within the scope of S. 3 (2) *d* of the Madras Estate Land Act there is *ab initio* no presumption that the grantees were not possessed of the Kudivaram at the time of the grant. This has to be proved by the party alleging it; no doubt facts might be proved from which the desired inference could be drawn and in the case of an old grant like the present, no other means of proof would probably be available. But this has not been done in the present case; and we hold the decision of the lower appellate Court on the question of jurisdiction to be correct.

As regards the right to eject, the findings of the lower appellate Court conclude the case.

The second appeal is dismissed with costs.

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1. (1914) 27 M. L. J. 233.

Kancharla Venkatraman v. Koganti Venkatramiah.

The Offg. Chief Justice.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir John Edward Power Wallis Kt. Officiating Chief Justice and Mr. Justice Seshagiri Iyer.

Kancharla Venkatraman and others ... *Appellants** (*Defendants*).

v.

Koganti Venkatramiah and another ... *Respondents* (*Plaintiff and 9 defendant*)

Limitation Act (Act V of 1908), Art. 144—Hindu Law—Widow—Adoption—Adverse possession against—Not adverse to adopted son—Suit within twelve years of adoption.

Adverse possession against the widow is not adverse possession against the adopted son and a suit brought by him for the recovery of immoveable property belonging to the estate within 12 years of his adoption is in time.

Sriramulu v. *Krishnamma* (1), *Moro Narayan Joshi* v. *Balaji Ragunath* (2), *Hari* v. *Waman* (3), *Haruck Chand* v. *Bejoy Chand Mahtoh* (4), followed.

Appeal from the decree of the Court of the Temporary Subordinate Judge of Masulipatam in O. S. No. 13 of 1912 (District Court of Kistna).

P. Nagabhushanam and *T. R. Venkatrama Sastri* for Appellants.

V. Ramadoss for Respondent.

The Court delivered the following

Judgments.—*The Officiating Chief Justice*:--We see no reason to differ from the clear and well reasoned judgment of the Subordinate Judge. The question is whether the suit properties belonged to Bapayya who died about 1859, or to his wife Kannamma who died in 1875. From at least 1827 to 1875 when Ramachandrudu Bapayya's son died, the suit lands are shown to have been cultivated by them. After Bapayya's death part of the land was alienated by Ramachandrudu's guardian. After Ramachandrudu's death there were disputes between his young widow who many years later adopted the plaintiff and his mother Kannamma, and eventually it was agreed to divide the properties between them. The lands which fell to Kannamma are now in possession of the descendants of her daughters. The plaintiff suggests that the grant to Kannamma was for her maintenance and that after her death Kotamma failed to recover the properties

*Appeal 129 of 1913. 22nd September 1914.

1. (1902) I. L. R. 26 M. 143.
2. (1892) I. L. R. 19 B. 809.
3. (1901) 2 Bom. L. R. 411.
4. (1905) 9 C. W. N. 795.

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and that on his adoption in 1904 he acquired a good cause of action.

We think the long possession of Bapayya and his son raises the presumption that the lands were their property. On the other hand, the defendants have altogether failed to prove that the properties ever belonged to Kannamma's father who is said to have borne the name of Akkayya. The Zemindari accounts show that one Akkayya owned some of the suit lands in 1802 but there is no reliable evidence, he was Kannamma's father, and as Bapayya and Ramachandrudu acquired lands, it may well be as observed by the Subordinate Judge that these particular lands were acquired from strangers.

The probability is that on the death of Ramachandrudu leaving a childless widow his mother Kannamma who had her daughter's children living with her ordered Kotamma to allow her to have half of the properties. Such an arrangement would not be unnatural and is, we think, borne out by the evidence. Subsequently the grant to Kannamma was referred to by Kotamma as made for her maintenance. It is of course clear that such an arrangement could not bind the reversioners or a subsequently adopted son. The Subordinate Judge has held that the suit was not barred, following the judgment of Bhashyam Iyengar J. in *Sreeramulu* v. *Kistnamma* [1]. Though the observations of that learned Judge were *obiter* they were in accordance with the decision of Farran C. J. and Candy J. in *Moro Narayana Joshi* v. *Balaji Raghunath*[2] which was followed by Jenkins C. J. and Candy. J. in *Hari* v. *Waman* [3] and by Harrington and Mookerjee JJ. in *Harrack Chand Babu* v. *Bejoy Chand Mohatab* [4]. In these decisions it has been held that an adopted son is entitled under Art. 144 to sue for immoveable property within 12 years from the date of adoption. We have also been referred to the decision of the Privy Council in *Runcho Das* v. *Parvati Bai* [5] that a reversioner's right to sue for moveable property accrues on the death of the widow and that consequently he has six years under Art. 120 which supports the same view.

For these reasons I am of opinion that the appeal fails and must be dismissed with costs. The memorandum of objections is dismissed with costs.

1. (1902) I. L. R. 26 M. 143. 2. (1892) I. L. R. 19 B. 809
3. (1901) 2 Bom. L. R. 411. 4. (1905) 9. C. W. N. 795.
5. (1899) I. L. R. 23 B. 725.

Kancharla Venkatraman v. Koganti Venkatramiah.

Seshagiri Aiyar J.

Seshagiri Iyer J:—The learned Chief Justice has found on the facts. I entirely agree. The point which arises for decision is whether the adopted son's right is lost by the defendants having acquired title to the property by adverse possession against his mother: Under the Limitation Act XIV of 1859, it was settled law that adverse possession against a widow in possession as limited owner bound the reversioners as well as the adopted sons. See *Amritlal Bose* v. *Rajonikant Mitter* [1]; *Krishnaji Janardhan* v. *Morbhat* [2] and *Atchamma.* v. *Subbarayudu* [3]. The principle of these decisions seems to be that, as a widow in possession represented the estate for the time being, prescription against her affected the estate and not only her limited interest in it.

A distinction was however, made in the case of alienations by a widow. In such cases it was held that the act of the widow only affected her interest in the property; see *Gya Persad* alias *Lal Persad* v. *Heet Narain* [4] and *Srinath Kur* v. *Prosunno Kumar Ghose* [5]. In this state of the law, Act IX of 1871 was introduced. Articles 141 to 145 correspond to articles 140 to 144 in the acts of 1877 and 1908: it is clear that the legislature intended by these new articles to introduce a radical change regarding the starting point of limitation. Article 141 (I shall refer to the Act of 1908 hereafter) gives the reversioners a period of twelve years to recover the property of the last male owner from the death of the widow, thereby indicating that acquisitions of rights against her are of no avail against reversioners. The position is made clearer by S. 28 of the Limitation Act which was introduced for the first time in the Act of 1871 (S. 29 of that Act): by that section the right extinguished and consequently the right acquired by the person prescribing is the right of the person in possession. This is giving effect to the principle mentioned by Muthuswami Iyer and Shepherd JJ. in *Sambasiva* v. *Raghava* [6] where they say, " that it has been repeatedly held that the title acquired by adverse possession for 12 years is only equivalent to that given by a parliamentary grant of the

1. (1874) 15. B. L. R. 10. P.C.
2. (1888) I. L. R. 13 B. 276.
3. (1870) 5.M. H. C. R. 428.
4. (1882) I. L. R 9 C. 93.
5. (1883) I. L. R. 9 C. 934.
6. (1890) I. L. R. 13 M. 512.

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interest vesting in the party affected by the adverse possession." The party affected in the first instance being the widow, it is only her interest that is acquired: it seems to me therefore obvious that the legislation of 1871 proceeded on the ground that no one can ordinarily prescribe for more than what the person against whom he is prescribing is entitled to. But the matter has been complicated by introducing a special article in the case of reversioners and by not providing in a similar way for the case of adopted sons. Further article 134 by making it possible for a stranger to bind the whole estate by taking a conveyance from a limited owner shows that the principle I have been referring to is not of universal application.

As pointed out by Mr. Justice Bhashyam Iyengar *in Sreeramulu* v. *Kistnamma* [1] there is no justification for placing an adopted son in a worse position than that of a reversioner; it may be a case of omission on the part of the legislature to safe-guard his interests in the same way as it has done in the case of a reversioner. We have therefore to see whether the existing provisions are not sufficient to protect him. If article 144 applies to the case of an adopted son, he will practically be in the same position as a reversioner; this can be done on the analogy of the decision of the Judicial Committee in *Ranchodas* v. *Parbati* [2]. There it was held that when a reversioner seeks to recover the moveable property of the last male owner, he has 6 years from the death of the widow to sue: it was pointed out that there is nothing corresponding to article 141 regarding moveables. Their Lordships held that the cause of action to sue arises, on general principles, on the death of the widow in the case of a reversioner. The same rule *a fortiori*, governs the right of an adopted son.

The principle of the decision is that until the plaintiff's right to immediate possession accrues, his right to possession is not barred. In the case of a reversion the cause of action will accrue on the death of the widow: in the case of an adopted son on his adoption.

As the Judicial Committee held that the residuary article 120 applied to moveables, we may hold that the residuary article

1. (1902) I. L. R. 26 M. 143   2. (1899) I. L. R. 23. B. 725.

Kancharla Venkatraman v. Koganti Venkatramiah. Seshagiri Aiyar J.

144 applies to a suit by the adopted son for the recovery of immoveable property.

If Art. 144 applies and if the starting point is the date of his adoption, the present claim is not barred by limitation. This conclusion has the sanction of eminent Judges in this country. See *Sreeramulu* v. *Kristnamma* [1]. *Moro Narayana Joshi* v. *Balaji Raghunath* [2], *Hari* v. *Waman* [3]; and *Harruck Chand Bibi* v. *Bejoy Chand Mahatab* [4]. The defendants have not therefore, acquired any right by prescription against the plaintiff. The appeal must be dismissed with costs

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Sir John Edward Power Wallis Kt. Officiating Chief Justice and Mr. Justice Hannay.

Bhathey Sundara Rajan and others ... *Appellants** (*Defendants*).

v.

A. A. Kuppusami Iyer and another ... *Plaintiffs* (*Respondents.*)

Sundara Rajan v. Kuppusami Iyer. The Offg. Chief Justice.

Inventions and Designs Act (Act V of 1888), Ss. 20, 29—Suit for infringement of Patent—Pleas—Want of novelty—Want of subject matter—Included in—General Clauses Act,—S. 6—Indian Patents and Designs Act II of 1911—Suits instituted before—Applicability of—In respect of defences open.

Under the Patents Act of 1888, the defendant in an action for infringement of patent is not allowed to raise the defence that the device is not new unless he satisfies the conditions of S. 29 Cl. (4).

Plea of want of subject-matter is included in the plea of want of novelty and is excluded by the section.

Having regard to S. 6 (e) of the General Clauses Act, the provisions of Act II of 1911 enlarging the defences open in a suit for infringement cannot apply to suits instituted before the coming into force of that Act.

Appeals from the decrees of the District Court of Madura in O. S. Nos. 2, 3, 4 and 5 of 1906 respectively.

C. V. Anantakrishna Aiyar for Appellants.

T. Rangachariar for Defendants.

The court delivered the following

Judgment.—*The Officiating Chief Justice*:—These are appeals from the judgment of the District Court of Madura in several

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* A. No. 141 to 144 of 1908. 20th August 1914.

1. (1902) I. L. R. 26 M. 143.
2. (1892) I. L. R. 19 B. 809.
3. (1901) 2. Bom. L. R. 411.
4. (1905) 9 C. W. N. 795.

Sundara Rajan v. Kuppusami Iyer.

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connected cases in which the plaintiffs sued for an infringement of a patent taken out by the 1st plaintiff in the year 1902 for the "Ampthill Patent Loom." The District Judge has found that the infringement has been proved and has given judgment for the plaintiffs.

Under the Patents Act of 1888 ("The Invention and Designs Act V of 1888") a defendant in an action for infringement is not allowed to set up by way of defence all the grounds on which the grant of the Patent could be opposed, grounds which are to be found in S. 20 of the Act. One of those grounds is that invention was not a new invention. Under S. 29 (4) a defendant is not allowed to set up the defence that the invention was not new, "unless the defendant or some person through whom he claims, has, before the date of the delivery of the application for leave to file the specification, publicly or actually used in some parts of British India or of the United Kingdom the invention with respect to which the exclusive privilege is alleged to have been infringed."

Now, it has been sought, in the argument before us, to escape from the operation of this section on two grounds; it has been contended for the Appellants that the defendant is not precluded from pleading that the alleged invention was not the proper subject-matter of a patent, or that there was no subject, matter for the patent. It is quite true that in English patent cases it has been the custom to plead, not only that the alleged invention was not new, but also, that it was not the proper subject matter for a patent; and accordingly, in many text books this matter is treated as distinct from the question whether the invention is new, whereas other text-book writers analysing the matter have pointed out that there is no real distinction. This objection was taken before me sitting on the original side last year (in O. S. No. 178 of 1911) and I disallowed it. It is quite clear from a perusal of the Patents Act of 1888 and the same conclusion follows from a perusal of the present Patents Act, (the Indian Patents and Designs Act II of 1911) that the framers of these Acts did not intend that there should be any separate defence to the grant of a patent on the ground of want of subject-matter as distinguished from want of novelty.

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The grounds upon which the grant of a Patent may be opposed are set out in S. 20 of the Act of 1888, and they contain no mention of any defence of want of subject-matter. The Legislature, if I may say so, I think, rightly took the view that any defence which had been raised under that head might appropriately be brought under the head of want of novelty. Consequently, we are of opinion that it is not open to the appellants in these cases to raise any defence of want of subject-matter as distinguished from want of novelty, and if they wish to rely upon want of novelty, then of course they are bound by the restrictions in S. 29 (4).

A second attempt was made to escape these embarrassing provisions. It was pointed out that there is no such restriction on the defendants under the Act of 1911. Under that Act, as in England, any of the statutory grounds for opposing the grant of the Patent may be pleaded in answer to an action for an infringement of a patent. It was argued that, although this provision was not in force at the time that this suit was tried and decided in the Lower Court, we were a Court not only of appeal but of re-hearing also and that we ought to apply the law as it at present exists to apply the Statute of 1911 rather than the Statute of 1888, and we were referred to a case in *Kanakayya v. Janardhane Padhi*[1]. That decision of the Full Bench is not authority for any such extensive proposition; that decision is entirely limited to the construction of the word 'final' in a certain section of the Madras Estates Land Act (Madras Act I of 1908). Even as to that, the learned Chief Justice who presided entertained some doubt as to the correctness of the ruling, but in any case that decision is no authority for any broad proposition as to the retrospective operation of Statutes. However, it is unnecessary to deal with this question on grounds of general principle because it is most clearly dealt with by one of the provisions of the General Clauses Act (X of 1897) which deals with cases "where any Act of the Governor-General made after the commencement of this Act, repeals an enactment hitherto made." The Act II of 1911 has repealed the Act V of 1888 and therefore it is a clear case for the application of the section. Now, section 6 (e) provides that "unless a

1. (1910) 21 M. L. J. 31 (F.B.)

Sundara Rajan v. Kuppusami Iyer.

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different intention appears, the repeal shall not affect" "any investigation, legal proceeding, or remedy in respect of any such right, privilege, obligation, or liability, penalty, forfeiture or punishment as aforesaid." And the words "legal proceeding" are sufficiently wide to cover a suit for infringement. It is however expressly provided that any such legal proceeding or remedy may be continued or enforced as if the Repealing Act had not been passed. It is therefore clear that this objection also must be over-ruled. It only remains then to see whether the District Judge has arrived at a correct conclusion with regard to the limited defence to which the defendants are restricted so far as regards want of novelty.

Under S. 29 (4) it is for the defendant to show that either he or some person through whom he claims, before the date of delivery or receipt of the application has publicly or actually used the invention. The District Judge has found that none of the defendants in these appeals has discharged that burden and as regards all but one of them the learned Vakil for the appellants has been unable to contend even that they have discharged it, because they have failed to produce any evidence of prior user on their own part or on the part of those through whom they claim and therefore these appeals must fail. As regards one of the appeals (No. 143) the defendant in the Lower Court has adduced some evidence but the District Judge has found that he has not discharged the burden. In this connection the District Judge has called attention to the provisions of S. 37 of the Act which require that both the defendant should deliver "a written statement of the particulars of the grounds, if any, upon which he means to contend that the plaintiff is not entitled to an exclusive privilege............." There is a further provision that no evidence at the trial shall be allowed to be given in proof of any breach of the conclusive privilege, or of any ground impeaching the validity of that privilege, or of any objection or ground affecting such a privilege, unless such breach or other matter as aforesaid has been stated in the particulars delivered under this section."

Now, in his written statement this defendant did not give any particulars—and he does not seem to have been called upon to give any particulars—it was only at the trial it was discovered that he ought to have been called upon to deliver

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particulars. He was however a party to an affidavit which was put in at an early stage of the case on behalf of himself and the other defendants (Exhibit T 7) and I think this affidavit may be treated as particulars. That affidavit says that "Obla Munisami Iyer started his loom 15 years ago and worked it through Sambu Ramaswami Naicker, Hanumanta's son Alagiriswami and others." At the trial this defendant did not even attempt to prove this, and it was disproved. Obla Munisami was called as the 14th witness and he said he was a weaver and purchased goods from others, but he denied he had started this system. He said he got some of these cloths with borders with animal patterns, the first of them in 1900. It is not necessary to pursue this part of the case further, because it is not the case on which this defendant relied at the trial. Assuming that he was at liberty to go into it—if he was to be allowed to go into it—the particulars ought to have been amended as provided in the Act. His defence was that he learnt the process from one Ghose Krishnier of Tanjore the 26th witness. We agree with the learned judge that this story is most unsatisfactory and cannot be accepted. Ghose Krishnier says he learnt this system from Benares but, as the District Judge points out, no one was called who could speak with any authority as to whether such a system was known in Benares at all. On the other hand, there is evidence that such knowledge as this man Krishnier had of this system, he acquired in Madura, and apparently through the instrumentality of this defendant, so that it was this defendant who taught Krishnier rather than Krishnier taught this defendant and after the date of the application. Exhibit 35 (*d*) (p. 176 of the printed papers) is an entry in Krishnier's account showing the expenses incurred in going to Madura to work '*Adaipet*.' Exhibit Y of the 18th June 1901 is another entry in the accounts of the 13th witness. T. K. Venkatarama Aiyar a cloth merchant in Madura showing that he paid Balian, that is to say, this defendant, remuneration for preparing an *Adaipet* harness on Ghose Krishnier's account, so that in 1901 after this patent had been applied for—we find Krishnien going to Madura to learn to work '*Adaipet*' and getting on *Adaipet* harness prepared--a phrase which covers the plaintiff's invention. All this evidence points to Krishnien first becoming acquainted with process of this kind in 1901, so that he cannot have taught it to the defendant in 1897 as alleged in the

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defendant's evidence. As pointed out by the District Judge there is another part of the evidence which discredits Krishnien's story. According to his own evidence, he first met Baliah at the house of the 13th witness T. K. Venkatrama Aiyar and the 13th witness then mentioned that this defendant Baliah was about to work for him. Exhibit 28 which is the agreement under which Baliah, the defendant, worked for the 13th witness is dated the 26th of May 1900, so that the first meeting between Krishnien and Baliah would be in 1900. That again disproves the story that the defendant Baliah learnt the process from Krishnien in 1897. Now, it is not the present defendant's case, and there is no evidence, that he learnt this process in any other way. Nor is there any satisfactory evidence that he used it before the date of the plaintiff's application.

In argument in appeal, reliance was placed on Exhibit 28; it is dated 26th May 1900. This is the agreement that I have just referred to. All this agreement says is "we shall bring you what we have weaved newly." There is no express reference to weaving by "*Adaipet.*" Assuming that the defendant in June 1900 was producing borders with animal patterns, it does not follow that he was doing so by the plaintiff's process or anything like it. In June 1900 he is found purchasing Vulties in considerable quantities Vulties, as explained in the judgment of the District Judge are the reeds which were used before the plaintiff's invention and which under the plaintiff's invention were discarded in favor of twines. His evidence is that he would not use Vulties when working in the *Adaipet* system. Therefore, the only inference is that the Vulties which he bought in June 1900 were to be used on something very like the old system, and there is further evidence, which the District Judge has accepted, that it was possible, with this vulty system to produce animal patterns though it was a much more troublesome thing than under the plaintiff's system. The evidence goes to show that the plaintiff's invention was complete in 1900 and that in that year he shewed it to Mr. Chatterton, the Director of Industries, when he visited Madura; and, it was only material that it should have, at any rate in a general sort of way, got known to the weaving community in Madura, and it may well be that attempts were made to copy it, even at that very early stage.

There is rather a suggestive piece of evidence in this respect which was put in by the defendants, Exhibit 10 series. That shows that there was a suit brought by a cloth merchant against a weaver who had obtained an advance from him on a promise to make an *Adipet* machine and had failed to do so. Then we have Exhibit 32 which is dated 2nd March 1901—that is after the application. That is a post card to the present defendant, Baliah from his cousin in which the cousin asks 'can the adipet you are now using be used for the border only or for the whole cloth'? This may show that the defendant had got wind of the plaintiff's invention and was using something of the same sort, but it certainly does not show that the defendant had been using this particular process before the date of the plaintiff's application. The meaning of this post card would have been much clearer if the letter to which it is a reply had been produced and it is very significant that it has not been produced.

As regards the evidence not directly connected with the present defendant the District Judge observes, and the evidence appears to bear him out, that there is no satisfactory evidence of the manufacture of these animal borders in Madura before 1900, before the time when the plaintiff was making this invention, but it is not necessary to go into the general aspects of the invention, and it is undesirable to do so, because they are the subject matter of an application for revocation which will have to be dealt with on the original side of the court. For the purpose of disposing of these appeals, it is sufficient to say that in our opinion the District Judge was right in holding that the defendant had failed to discharge the burden of showing that this process was used either by the defendant himself or by those through whom he claims before the date of the plaintiff's application.

The result is that the appeals fail and are dismissed with costs.

Hannay J:—I agree.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Sir John Edward Power Wallis Kt. Officiating Chief Justice, and Mr. Justice Hannay.

Sri Datla Venkata Subba Raju Garu and another .. *Appellants.** (*Plaintiffs.*)

v.

Gatham Venkatrayudu Minor by Sani Varapu Venkiah. ... *Respondent.* (*2nd Defendant*)

Venkata Subba Raju Garu *v.* Gatham Venkatrayudu

Evidence Act, S. 112—Date of conception—No presumption of, being on 280th day before birth—Hindu Law—Alienation by father—Birth of son within 280 days—Effect of.

Though there is a conclusive presumption that a child born within 280 days after access has ceased, is legitimate, there is no similar or any presumption that a particular child was conceived on the 280th day before its birth. It is matter for proof in each case when the conception took place and in the absence of evidence as to it, the party relying upon the fact of such conception must fail.

Quaere : Whether purchasers for value are bound to inquire whether the wife of the alienor is *enceinte*.

Minakshi v. *Veerappa* (1), referred to.

Appeal from the decree of the Court of the Subordinate Judge of Cocanada in O. S. No. 76 of 1910.

The suit was for sale on a mortgage bond executed by the 1st defendant, the father of the 2nd defendant. The bond was executed 276 days before the birth of the 2nd defendant. The 1st defendant admitted the execution of the bond and his liability thereunder. But the 2nd defendant denied the genuineness of the bond and contended that it was not binding on him. The plaintiff's case was that the 2nd defendant was not in existence on the date of the execution of the bond and could not therefore dispute its validity. The Sub-Judge of Cocanada held that under S. 112 of the Evidence Act the presumption was that the 2nd defendant was in the womb on the date of the execution of the bond. He accordingly decreed the suit as against the 1st defendant and his share of the family properties and dismissed it as against the 2nd defendant and his share of the family properties. From his decree the plaintiff preferred the above appeal.

P. Narayana Murti and *P. Somasundram* for Appellants.

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* Appeal No. 280 of 1911. 7th August 1914.

1. (1884) I.L.R. 8 M. 89.

The onus is on the son to show that he was conceived in the womb on the date of the suit bond. S. 112 of the Evidence Act lays down a rule of presumption only with respect to legitimacy and has no application to a case in which the question is raised as to the exact time of conception.

There is no presumption of law or fact that any person was conceived at a particular time, as the period of gestation varies according to Western Medical Science from 220 to 314 or 320 days. Taylor on Medical Jurisprudence, p. 48. Even assuming that the 2nd defendant was conceived on the date in question a *bona fide* purchaser for value is protected as it is impossible for even the mother, much less for a stranger, to know whether a a child has been conceived or not.

The Respondent was unrepresented.

The Court delivered the following

Judgment:—In this case the Court has found that the alienation by the 1st defendant the undivided father of the 2nd defendant was made 276 days before the birth of the 2nd defendant and has come to the conclusion that it was made after the 2nd defendant was conceived and at a time when the 2nd defendant had acquired an interest in the property. This conclusion he has based on S. 112 of the Evidence Act which provides "that the fact that any person was born during the continuance of a valid marriage between his mother and any man, or within the 280 days after its dissolution, the mother remaining unmarried shall be conclusive proof that he is the legitimate son of that man unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten." The presumption is that a child born within 280 days after possibility of access shall be deemed to be the legitimate child of the father. It is not that such a child was conceived 280 days before its birth. 280 days was no doubt the period chosen in the section because it is accepted as the average period of gestation, but Taylor and other medical authorities show that is only an average and that the period is often longer or shorter in individual cases. In these circumstances there does not seem to be any strong reason for raising a presumption that the particular child was conceived 276 days before his birth. Whether he was or not is susceptible of proof as, where access has

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been continuous even the mother could not give the date of conception within a few days.

We have not been referred to any more or less arbitrary rule of Hindu Law fixing the date of conception at so many days before birth, and, as observed in *Minakshi* v. *Virappa* [1] science has not arrived at such a point that, where there has been frequent opportunity of access between the parents a conclusive opinion can be formed as to the exact moment of conception. In this state of things the learned Judges observed that there are obvious reasons of convenience for holding that a purchaser for value is not bound to enquire whether the wife of the seller is *enceinte* and suggested that the rights of a son in the womb to ancestral property might possibly not prevail against an alienee for value. We abstain from discussing the question as it is unnecessary and the respondent is not represented before us.

For the purposes of the present case, it is sufficient to say that if the 2nd defendant desires to rely on the defence that he was conceived before the date of the alienation in question it is incumbent on him to prove it by clear and satisfactory evidence and this he has failed to do. We must allow the appeal and modify the decree accordingly with costs both here and below.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Kumarasami Sastri.

Krishnasami Pillai v. Kothandarama Pillai.

Krishnasami Pillai	... *Appellant.**
v.	*(3rd Defendant)*
Kothandarama Naicken and others	... *Respondents.*
	(Plaintiffs and
	(1st Defendant.

Dedication—Public charitable trust—Revocation—Validity—Conduct of the settlor.

Where there has been a complete dedication of properties to public charitable trusts there can be no revocation.

The subsequent conduct of the founder in not giving effect to it will not render the trust nugatory.

* S. A. No. 2335 of 1913. 13th August 1914.

1. (1884) I. L. R. 8 M. 89.

Krishnasami Pillai v. Kothandarama Pillai.

Re Shums Trust.: *Prichard* v. *Richardson* (1) followed. *Pallaya Chetty* v. *Vedachellam Pillai* (2), *Mahadeva Iyer* v. *Sankarasubramania Iyer*, (3) Ref. to *Abdul Rajak* v. *Bai Jimhabai* (4) followed. *Suppammal* v. *Collector of Tanjore* (5) distinguished.

Second appeal from the Decree of the Court of the Subordinate Judge of Negapatam in A. S. No. 694 of 1912, preferred against the decree of the Court of the District Munsiff of Negapatâm in O.S. No. 46 of 1911.

G. S. Venkatrama Aiyar and *G. S. Ramachandra Aiyar* for Appellant.

C. S. Venkatachariar and *K. Narasimha Aiyar* for Respondents.

The Court delivered the following

Judgment:—The facts of this case are not in dispute. On the 11th November 1894 one Nilayathakshi executed a deed of trust (Exhibit 1) by which she settled certain properties on a temple. She constituted herself the trustee during her life time and provided in the said deed for the carrying out of the trust by certain individuals after her death. She died on the 12th April 1907. On the day previous to her death she executed a will (Exhibit IV) by which she purported to revoke Exhibit I and to make a new disposition of her properties. The dispositions themselves were in favour of the temple to which she had given the properties comprised in Exhibit I. The present suit is brought for a declaration that the will of 1907 is inoperative and has not the effect of revoking the trust of 1894; and that under the terms of the trust deed the plaintiffs are entitled to possession.

The question for consideration is whether there was a complete dedication of the properties Exhibit I, to the temple and if so, whether it was competent to Nilayathakshi to revoke the trust. We think there was a complete dedication. In the document itself she says "I have given away by this deed of gift this day to the said Sri Nilayathakshi Ambal the said shops, etc." It is true that later on she says "I shall establish a Kattalai in my name for charity in the night time." This clause should not be construed as indicating an intention to settle the property

1. (1904) 91 L. T. 192.
2. (1911) 2 M. W. N. 376.
3. (1911) 2 M. W. N. 382.
4. (1911) 14 Bom. L. R. 292.
5. (1889) 12 M. 387.

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only in future. It only indicates that the details in respect of the dedicated property shall be settled later on. Much stress was laid upon the statement in Exhibit I to the effect that this deed of gift and some other documents "which are the title deeds for the said shops" have been handed over to Kothandarama Naicker. It is not disputed that the deeds were not handed over. From this it is argued that the settlor never fully carried out the dedication. It is in evidence that this lady contemplated that she would die almost immediately; but she recovered and lived for a considerable time. She therefore rightly held possession of this document as under the terms of the trust she was herself to be the trustee during her lifetime. We do not think that the fact that the deed of gift was not handed over is any indication of the terms of the trust not having been given effect to.

There is further the fact that in the year 1906 she purported to cancel Exhibit I by a registered document Exhibit III. Exhibit III says "I have hereby cancelled the deed of gift which has been executed by me on the 11th November 1894 to the name of Sri Nilayathakshi Ambal." It is clear from this recital that the lady treated Exhibit I as a valid dedication; only she thought she had power to revoke it. She says "I am not now willing to act according to that deed of gift". The fact mostly relied upon by the learned Vakil for the appellant is that after Exhibit I Nilayathakshi dealt with the property as if it was her own and never carried out any of the terms of the trust contained in Exhibit I. The argument is that Exhibit I was simply a paper transaction which was never intended to have effect. If there has been a valid dedication the subsequent conduct of the settlor will not render it nugatory. At the time of the settlement all that was necessary to give effect to the wishes of the settlor had been done. If the terms of the settlement are not carried into effect it will make the settlor liable for breach of trust. It will not destroy the once validly created settlement. Under the Indian Trusts Act (II of 1882), which no doubt applies in terms only to private trusts, it is not open to a settlor to revoke a completed settlement. The English law is to the same effect. See *Newton* v. *Askew* [1],

1. (1848) 11 Beav. 145 ; s. c. 50 E. R. 772.

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Ellison v. *Ellison* [1]. Our attention has not been drawn to any case in which it has been held that after a valid dedication to public uses it is open to the settlor to revoke it. On the other hand in Tudor on Charities it is stated that there can be no revocation after a valid dedication to charitable uses and the case of *Re Shum's Trust; Prichand* v. *Richardson* [2], is quoted in support of it. It was broadly argued by Mr. Ramachandrier that according to decided cases if the terms of the trust have not been given effect to it must be presumed that there has been no valid dedication. The case of *Suppammal* v. *The Collector of Tanjore* [3] is chiefly relied upon for this proposition. In the first place it is to be remembered that in that case the property dedicated was the joint family property of two brothers one of whom alone executed the deed of trust. It is true that the language of Parker J. would seem to indicate that when the trust was not carried out to document must be regarded as of no effect; but the learned Judge also referred to the fact that it was by one of the undivided brothers that the settlement was made. We do not think that the learned Judges intended to lay down as a matter of law that where the terms of a trust have not been given effect to the defaulting trustee can claim to revoke the trust.

The case of *Muhamad Aziz-ud-din Ahmad Khan* v. *The Legal Remembrancer to Government* [4] proceeds upon grounds which are peculiar to the Muhammadan Law. The author of the trust never parted with the possession until his death, and, as under the Muhammadan Law in cases of gifts and trusts possession is essential, it was held in that case that there was no complete dedication to public uses by the mere execution and registration of the document. On the other hand in the case reported in *Hidaitoon-Nissa* v. *Syud Afzul Hossein* [5] it has been held that where a voluntary settlement has been completed it is not open to the settlor to revoke it. The cases of *Pullayya Chetty* v. *Vedachella Pillai* [6] and *Mahadeva Iyer* v. *Sankara Subramania Aiyar* [7] distinctly lay down that in cases of public

1. (1802) 6 Ves. 656 ; s. c. 31 E. R. 1243.
2. (1904) 91 Law Times 192.
3. (1889) I. L. R. 12 M. 387.
4. (1893) I. L. R. 15 A. 321.
5. (1870) 2. N. W. P. H. C. R. 420.
6. (1911) 2 M. W. N. 376
7. (1911) 2 M. W. N. 382

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trusts there can be no revocation if there has been a complete dedication of the property. The case of *Abdul Rajak* v. *Bai Jimbabi* [1] supports this view. We must therefore hold that as on the execution of Exhibit I there was a complete dedication of the property to the temple it was not open to the Settlor Neelayathakshi to revoke that dedication by the will which she executed prior to her death. The decision of the Subordinate Judge is right and we dismiss the second appeal with costs of the plaintiff.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Ayling and Mr. Justice Hannay.

Reddi Rami Reddi ... *Petitioner* (Respondent.)*

v.

Public Prosecutor of Kurnool ... *Respondent (Petitioner.)*

Rami Reddi v. Public Prosecutor of Kurnool.

Cr. Pr. Code S. 195—I. P. C. S. 182, 193—Sanction for offences under, by Sessions Judge—Statement made to Police officer and Sub-Magistrate—Incompetent—Sanction for offence under S. 193—Contradictory statements—Court to be competent to give sanction for both statements.

Where a Sessions Judge granted sanction for offences under, S. 182 I. P. C. for having sent false reports to the Police and the Sub-Magistrate and also for an offence under S. 193 for having made two contradictory statements one of which was made to the Sub-Magistrate in the course of a local inquiry under S. 64 Cr. P. C.

Held that neither the Police officer nor the Sub-Magistrate being subordinate to the Sessions Judge the sanction was *ultra vires*.

A Court granting sanction under S. 193 in respect of contradictory statements must be competent to grant sanction in respect of each of the statements.

Petition praying that in the circumstances stated therein the High Court will be pleased to revoke the sanction granted by the Sessions Judge of Kurnool for the Prosecution of the Petitioner (Respondent) in Cr. M. P. No. 5 of 1914 in Sessions Case No. 54 of 1913 on the file of the Sessions Court of Kurnool.

Dr. S. Swaminadhan and *O. Lakshmanaswami* for Petitioners.

Public Prosecutor (*Nugent Grant*) for Government.

The Court made the following

Order :—As regards the sanction for prosecution under S. 182 I.P.C. neither the Police officer nor the Sub-Magistrate to whom the reports Ex. H and H, were sent is a subordinate of the Sessions

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* Cr. M. P. No. 178 of 1914. 16th September, 1914.

1. (1911) 14 Bom. L. R. 295.

Judge within the meaning S. 195 cl. 7 Criminal Procedure Code so that the Sessions Judge's order of sanction is *ultra vires.*

The same must be said of the order sanctioning prosecution for an offence under S. 193 I. P. C. in giving contradictory statements. It is necessary that a Court granting sanction in such circumstances should be empowered to sanction prosecution in respect of each of the statements said to be contradictory of each other. In the present case one of the two contradictory statements was made before the Sub-Magistrate in the course of a local inquiry under S. 164 Criminal Procedure and for the reasons above indicated the Sessions Judge had no power to give sanction in respect of this.

The sanction is set aside; it is open to the Public Prosecutor to apply to the Sub-Magistrate for a fresh sanction in respect of the two statements made before him.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Kumarasami Sastri.

A. Chidambara Gurukkal ... *Petitioner (Compt.)**

v.

Sengoda Goundan and another ... *Respondents (Accused)*

Criminal Procedure Code, S. 147—Right to enter temple and perform Kumbhabhishekham ceremony—Dispute relating to use of land—Formal record as to likelihood of breach of the peace—Not essential.

A right to enter a temple and perform the ceremony of Kumbhabhishekam is a dispute relating to the use of land within the meaning of S. 147 Criminal Procedure Code.

Kader Batcha v. *Kader Batcha Rowther* (1), *Muhammad Musalliar* v. *Kunjiche Mussalliar* (2), followed.

S. 147 does not require that the Magistrate should formally record a proceeding that there is in his opinion danger of a breach of the peace.

Miller v. *Rajendra Nath Choudhry* (3) followed.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Joint Magistrate of Salem in Case No. 8 of 1914 dated 4th April 1904.

L. S. Veeraraghava Aiyar for Petitioner.

S. Swaminadhan for Respondents.

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* Cr. R. C. No. 295 of 1914, Cr. R. P. 253 of 1914. 12th October 1914.

1. (1905) I. L. R. 29 M. 237. 2. (1887) I. L. R. 11 M. 323.
3. (1898) 2 C. W. N. 670.

Chidambara Gurukal v. Sengoda Goundan

The Court made the following

Order :—This is a petition against the order of the Joint Magistrate of Salem passed under S. 147 of the Criminal Procedure Code directing the petitioner not to perform the Kumbhabhishekam ceremony till he establishes his claim in a Civil Court: the case for the petitioner was that he as Guru of the Nathi and Vellala Goundars was the only person who was entitled to perform the Kumbhabhishekam ceremony in the Chinnamman temple, that the counter-petitioners were arranging to have the ceremony performed by another person, contrary to mamul and that a dispute likely to cause a breach of the peace exists. He prayed that the counter-petitioners be prevented from entering the temple and performing the ceremony.

The Joint Magistrate held that the petitioner did not make out his right and directed him not to perform the ceremony until he established his right in a Civil Court.

The grounds urged by the petitioner are

(1) that the right in dispute is not one falling under S. 147 of Cr. P. C. and that the Magistrate had no jurisdiction to pass the order,

(2) that there being no finding that there was any likelihood of a breach of the peace the order is irregular,

(3) that the right claimed being one which is not cognizable by a Civil Court, the order directing petitioner to abstain from the exercise of the right till he established his claim in a Civil Court is illegal.

As regards the first point there is a conflict of authority between the Calcutta and the Madras High Court. See *Guiram Ghosal* v. *Lal Behari Das* [1]. It was held that a dispute merely concerning a right to act as pujari in a temple is not within the scope of S. 147 of the Code and this decision was followed in *Ramsaran Pathak* v. *Raghu Nandan Gir* [2].

In *Kadar Batcha* v. *Kadar Batcha Rowthen* [3], it was held that a dispute as to the rights to use a mosque between persons claiming to be entitled to officiate as Kazi therein is a dispute coming within S. 147 of the Crl. P. The case of *Muhammad Musalliar* v. *Kunjichi Bheku Musalliar* [4] also supports the view taken in *Kadar Bacha* v. *Kadir Bacha Rowthan* [3]. In the present

1. (1910) I. L. R. 37 C. 578.
2. (1910) I. L. R. 38 C. 387.
3. (1905) I. L. R. 29 M. 237.
4. (1887) I. L. R. 11 M. 323.

case the right claimed is a right to enter the temple and officiate at the Kumbhabhishekam ceremony whenever it is necessary to perform the ceremony and it is difficult to distinguish it from the Madras cases above cited which I am bound to follow.

Chidambara Gurukal v. Sengoda Goundan

As regards the second point the petitioner alleged fear of a breach of the peace both in his petition and the statement given to Court. The Magistrate does not in so many words say that he is satisfied that there is danger of a breach but this seems to have been taken for granted by all parties. In the case of *Miller* v. *Rajendranath Chowdhry*[1] it was held that S. 147 does not require the Magistrate formally to record a proceeding that there is in his opinion danger of breach of the peace.

The order of the Magistrate is not bad on this ground.

As regards the third point the materials before me are not sufficient to enable me to decide whether the right claimed is purely one relating to religious rites or ceremonies and does not involve the right to use the temple for specific purposes and to receive emoluments. I see no reason to interfere with the order as to costs awarded by the Magistrate.

The petition fails and is dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Ayling and Mr. Justice Tyabji.

Tangaturi Sriramulu ... *Petitioner in Cr. Rev. Case* 106 *of* 1914 (1*st accused in C. C. No.* 109 *of* 1913 *on the file of the Joint Magistrate of Rajahmundry*).

Nalam Krishna Rao, and others ... *Petitioners in Cr. R. C. No.* 151 *of* 1914. (2*nd*, 3*rd and 4th accused in C. C. No.* 109 *of* 1913 *on the file of the Joint Magistrate of Godaveri.*)

v.

K. Veerasalingam ... *Respondent in both.*

Sriramulu v. Veerasalingam

Criminal Procedure Code, Ss. 437, 350, proviso (a) and (b), S. 253—Charge framed by Magistrate—Successor recommencing inquiry under S. 350—Order of discharge—Acquittal—Further inquiry—Power to order.

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* Cr. Rev. Case Nos. 106 and 151 of 1914. 25th August 1914.
Cr. Rev. P. 93 and 128 of 1914.

1. (1898) 2 C. W. N. 670.

Sriramulu
v.
Veera-
salingam
—
Ayling J.

Where after a Magistrate had framed a charge under S. 254 of the Code, he was transferred and his successor recommenced the inquiry under S. 350 and then passed an order of discharge under S. 253 (2).

Held, that a Magistrate who recommences an inquiry or trial cannot thereby modify its nature and the order must be treated as one of acquittal.

Held also that the District Magistrate who had ordered further inquiry had no power to do so.

The Crown v. *Nathu and others* (1) foll.

Petitions under Ss. 435 and 439 of the Code of Criminal Procedure of 1898 praying the High Court to revise the order of the District Magistrate of Godaveri in Cr. R. P. No. 2 of 1914 preferred against the judgment of the Joint Magistrate of Rajahmundry in C. C. No. 109 of 1913.

J. L. Rozario with *T. Prakasam* and *B. Narasimha Rao* *Counsel* for Petitioners in both.

E. R. Osborne, D. Appa Rao with *V. Ramadoss* and *N. S. Narasimha Chariar* for the Respondent.

Sydney Smith, for Public Prosecutor on behalf of Government.

The Court made the following

Order:—*Ayling J.* We are asked to revise an order of the District Magistrate of Godavari which directs under S. 437 of the Criminal Procedure Code further inquiry into the case of defamation in which the Joint Magistrate of Rajahmundry, Mr. Stewart, had passed what purports to be an order of discharge under S. 253 of the Code of Criminal Procedure.

Mr. Rozario on behalf of Petitioners argues that Mr. Stewart's order was, in effect, an order of acquittal under S. 258 of the Criminal Procedure Code. If this is so, the District Magistrate undoubtedly had no power to order further inquiry under S. 437 and his order must be set aside as *ultra vires*.

The facts are these. The case against Petitioners was first heard by Mr. Bardswell, Mr. Stewart's predecessor in office. He heard the Prosecution witnesses and framed a charge under S. 254 of the Criminal Procedure Code to which Petitioners pleaded not guilty. He was then transferred. Mr. Stewart recommenced the inquiry under S. 350 of the Criminal Procedure Code, examined the complainant as Prosecution witness No. 1 and then passed an order of discharge under S. 253 (2).

1. (1903) 38 P. R. Cr. 35.

Sriramulu v. Veerasalingam

Ayling J.

Mr. Rozario contends that a charge having once been framed it is not cancelled by reason of the recommencement of enquiry and the only course open to Mr. Stewart was either to record an order of acquittal or to convict (vide S. 258 of the Criminal Procedure Code).

The only question is whether the recommencement of a "trial" under S. 350 of the Criminal Procedure Code implies the cancellation of a charge framed by the first Magistrate. There appears to be no direct authority of this or any other High Court on the point though the Punjab Chief Court has considered a precisely similar case and arrived at the conclusion that the charge remains in force and the subsequent order must be treated as one of acquittal and not of discharge (vide *The Crown* v. *Nathu and others* [1]).

The interpretation of S. 350 is by no means free from doubt but on the whole I am inclined to agree with the view taken by the learned Judges of the Punjab Chief Court. The only object of the substantive portion of Cl. (1) of S. 350 seems to be to leave it to the discretion of the Magistrate to either act on evidence recorded by his predecessor or to hear it over again for himself. The discretion is somewhat restricted by proviso (*a*) and proviso (*b*) gives the superior courts-special powers of interference. Subject to these provisos the discretion is absolute. It is not clear why this should involve the cancellation of the charge or the transformation of the proceedings from a 'trial' back into an 'enquiry'. As far as this court is concerned, it is settled law that the proceedings before a Magistrate in a warrant case under chapter XXI of the Criminal Procedure Code are only an "inquiry" until a charge is framed; and on a charge being framed become a trial vide *Palaniandy Gounden* v. *Emperor*, and *Narayanasami Naidu* v. *Emperor* [3]. Bearing this distinction in mind it would seem to follow that where the proceedings re-commenced under S. 350 are only an inquiry they are recommenced as an inquiry. Where they are developed into the trial stage they are recommenced as a trial *i. e.*, a proceeding in which a charge has been framed. The second Magistrate cannot ignore the charge framed by his predecessor and his position is practi-

1. (1903) 38 P. R. Cr. p. 35.

2. (1908) I. L. R. 32 M 218. 3. (1909) I. L. R. 32 M 220.

Sriramulu v. Veerasalingam

Tyabji J.

cally the same as that of his predecessor would have been if after framing a charge, he had heard further cross examination of the prosecution witnesses under S. 256 (1) and, on a consideration thereof, become satisfied that the charge was not well-founded. It may not be altogether out of place to refer to *Sadagopachariar* v. *Raghavachariar* [1] where it was held that the recommencement of an inquiry under S. 350 did not cover a reference to the Police under S. 202 of the Criminal Procedure Code. I do not press the analogy but it is consistent with this to hold that a Magistrate who recommences an inquiry or trial does not thereby modify its nature or the stage at which it has arrived. Mr. Stewart's order must in my opinion be viewed as one of acquittal and the District Magistrate's order for further inquiry must be set aside.

Tyabji J:—S. 350 cl. (1) of the Criminal Procedure Code provides for the recommencing and re-hearing of the witnesses and the recommencement of the inquiry or trial by the Magistrate who succeeds after his predecessor has already heard the evidence. The section is silent on this question whether or not on such rehearing any charge that may have been already framed after the first hearing must subsist. In purporting to interpret S. 350 therefore we have really to decide what would have been provided in the section had the point been explicitly dealt with. It does not appear that the point can be considered to have been dealt with by some necessary implication in that which is expressly laid down. On the other hand, if it is assumed in this connection that the charge already framed should be considered to be wiped out, the assumption involves that the legislature has also overlooked the point that the succeeding Magistrate ought in that case to be empowered to frame a fresh charge or to adopt the charge already framed with or without alterations.

I am not prepared to say therefore that the interpretation put upon the section by the Chief Court of the Punjab is not the most reasonable one.

The Petitioner ought therefore to have been acquitted instead of being discharged and the District Magistrate had no power to order further inquiry. His order to that effect must consequently be set aside.

1. (1886) I. L. R. 9 M. 282.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sankaran Nair and Mr. Justice Tyabji.

The Sessions Judge of Coimbatore ... *Petitioner* *

The Sessions Judge of Coimbatore. *In re*

Criminal Procedure Code, S. 215—Reference to quash commitment charge of murder, grievous hurt, hurt and riot—No evidence of murder or grievous hurt—Necessity for further inquiry—No ground for interference.

Where the accused was committed to the Sessions on a charge of murder, riot, grievous hurt, &c., and a reference was made by the Sessions Judge to the High Court to quash the commitment on the ground that there was no evidence of murder or grievous hurt the only offences triable exclusively by the Sessions court and if the accused went to trial he would have to be acquitted whereas the case was one for further inquiry.

Held, that they were no reasons for quashing the commitment. *Emperor* v *Noor Mahomed Suleman* (1), followed; *Empress* v. *Narotam Das* (2), dissented from.

Petition praying that in the circumstances stated therein the High Court will be pleased to quash the commitment of the accused in Sessions Case No. 61 of 1914 on the file of the Sessions Court of Coimbatore (P. R. C. No. V of 1914) on the file of the 3rd class Stationary Magistrate of Erode.

The *Public Prosecutor* on behalf of Govrnment.

The Court made the following

Order:—The Sessions Judge has referred the case to this Court, to quash the commitment under S. 215, Criminal Procedure Code. Under that section the commitment can be quashed only on a point of law.

The accused was charged with having committed the offence of murder, riot, grievous hurt, and house-trespass. The Judge says that there is no evidence that Sinna Goundan who is alleged to have been murdered is dead, and there is also no evidence that any grievous hurt was caused. The other offences are triable by the magistrate. If the commitment is allowed to stand, the accused will have to be acquitted on the charge of murder but the Sessions Judge is of opinion that the case is one for further inquiry and the acquittal might preclude the police from making any such inquiry. He therefore asks us to quash the commitment on the ground that there is no evidence to justify the commitment. We are of opinion that on this ground it is not open to the High Court to quash a commitment. The accused is entitled to be acquitted if there is no evidence against him to support a conviction. The result of quashing

*Crl. M. P. 344 of 1914. 27th August 1914.

1. (1911) 13 Bom. L. R. 209.
2. (1883) I. L. R. 6 A. 98.

The Sessions Judge of Coimbatore. In re.

the commitment will be that he may be charged again with the offence. The Public Prosecutor has drawn our attention to the cases reported in *Emperor* v. *Suleman Ibrahim* [1], *Empress* v. *Narotam Das* [2]; and *Emperor* v. *Chandra Kumara Missur* [3].

We are unable to follow the Allahabad decision. The Bombay Judgment supports our view.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Ayling.

Mohidin Bacha Saheb ... *1st Accused in calendar case No. 183 of 1913 on the file of the sub-magistrates of Sattur.*

Mohidin Bacha Saheb. In re.

Criminal Procedure Code, S. 438—Conviction for lesser offence—Facts disclosing more serious offence Court not competent to try—Quashing of—Not called for unless accused prejudiced or sentence inadequate.

It is not necessary to quash a conviction merely because the facts disclose a more serious offence which the Court is not competent to try unless the accused was prejudiced or the sentence inadequate.

Case referred for the orders of the High Court under S. 438 of the Criminal Procedure Code by the District Magistrate of Ramnad in his letter dated 22nd July 1913, D. Dis. No. 829 Magl. 1913.

The *Public Prosecutor* on behalf of Government.

The Court made the following

Order:—The Sub-Divisional Magistrate has set aside the conviction of the accused for an offence under Ss. 352, 379 and 426 of the Indian Penal Code on the sole ground that the facts disclosed in the prosecution evidence amounted to an offence under S. 392 of the Indian Penal Code, which the original Magistrate, being only invested with 2nd class powers was not empowered to try. He has further proceeded to remand the case to the same Magistrate for retrial according to law: presumably meaning that action should be taken under S. 346, Criminal Procedure Code.

The Sub-Divisional Magistrate is wrong in considering that the original court's proceedings are void. It has been held both by this Court and by the Bombay High Court that, provided the Court had the power to try the offences of which it has convicted the accused, it is not necessary

* Cr. R. C. 440 of 1913. 25th September 1913.
Case Referred No. 66 of 1913.

1. (1911) 13 Bom. L. R. 209.
2. (1883) I. L. R. 6 A. 98.
3. (1906) 2 C. L. J. 46.

to quash the conviction merely because the facts disclose a more serious offence, which the Court was not competent to try; unless the accused was prejudiced or the sentence was inadequate vide *Queen Empress* v. *Gundayya* [1] and *King Emperor* v. *Ayyan* [2]. In the present case the robbery, if robbery it were, was of the most technical and trivial description, the accused having simply slapped the complainant on the head and snatched away a basket of sweetmeats. The accused was in no way prejudiced and the sentence imposed was perfectly adequate. There is no reason for subjecting the accused to a fresh trial.

Mohidin Bacha Saheb. *In re.*

Under these circumstances the order of the Sub-Divisional Magistrate directing a re-trial is set aside. He is directed to restore the appeal to his file, and dispose of it according to law in the light of the above remarks.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

FULL BENCH.

Present:—Sir John Edward Power Wallis, Kt. Officiating Chief Justice Mr. Justice Ayling and Mr. Justice Seshaghiri Aiyar.

P. Govindan Nair ... *Petitioner* (Plaintiff).*

v.

K. Nana Menon ... *Respondent (Defendant).*

Govindan Nair *v.* Nana Menon.

Promissory note—Karnavan of Malabar Tarwad—Execution in his own name—Not as Karnavan—Description in the body of the instrument as Karnavan—Suit on note by indorsee—Liability of Tarwad property.

Where, though in the body of a promissory note the maker is described as the Karnavan of the defendants' tarwad the note is signed by him in his own name and not as Karnavan of the tarwad and the suit is brought on the note and not on the original cause of action the tarwad property in the hands of the defendants cannot be made liable.

Krishna Aiyar v. *Krishnaswami Aiyar* (3) distinguished.

Petition under S. 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the Subordinate Judge of Palghat in S. C. S. No. 1504 of 1912.

The plaintiff, petitioner brought a suit as indorsee of a promissory note executed by one Kollaykal Nagappa Menon, deceased Karnavan of a Malabar tarwad. The defendant was the present Karnavan of the tarwad; the plaintiff prayed for a decree personally against the present Karnavan and against the

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* C. R. P. 186 of 1913. 22nd September 1914.

1. (1889) I. L. R. 13 B. 602. 2. (1901) I. L. R. 24 M. 675.

3. (1900) I. L. R. 23 M. 597.

Govindan Nair v. Nana Menon.

properties of the tarwad. The wording of the promissory note so far as material was as follows:—

"Promissory note executed by the Kollaykal Nagappa Menon, Karnavan and Manager of the Kollaykal of Puttisseri Amsam and Desam, Palghat Taluk in favour of Thenkurissi Velappa Menon of Puthoor Amsam and Desam, in the said Taluk; I hereby promise to pay you or order, on demand the sum of Rs. 210 with interest at the rate of 1% per mensem from this day as a warrant has been issued to arrest or send me to jail in satisfaction of the decree obtained against me in my capacity as Karnavan of the tarwad by the member of the family in O. S. No. 270 of 1907.

I have received satisfaction of the consideration for this promissory note by my having arranged with you to cause you to pay in Court to-morrow the decree-debt in the said suit.

2—9—1909. (Signed) Nagappa Menon.

The Subordinate Judge held that under a recent ruling of the High Court, the tarwad cannot be held liable and decreed the suit only as against the assets of the deceased obligor. The plaintiff applied in revision to the High Court for a decree as prayed for in the plaint.

The petition came on before Mr. Justice Sadasiva Iyer who referred the matter to a Full Bench.

C. Madhavan Nair for the Petitioner.

C. V. Ananthakrishna Aiyar for the Respondent.

The Court delivered the following

Judgment:—The suit has been treated as based on the promissory note executed by the deceased Karnavan of the defendant's tarwad, and not on the original cause of action. The decision *in Krishna Aiyar* v. *Krishnaswami Aiyar*[1] therefore does not apply and there is no ground for making the tarwad property in the hands of the defendant liable in the present suit.

The petition is dismissed with costs.

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1. (1900) I. L. R. 23 M. 597.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Oldfield & Mr. Justice Seshagiri Aiyar.

C. Raghunatha Row Sahib ... *Appellant** *(1st Defendant).*

v.

Vellamoonji Goundan ... *Respondent* *(Plaintiff).*

Raghunatha Row v. Vellamoonji Goundan

Estates Land Act, S. 53 cl. (2)—Patta incorrect as to rent—Distraint for a larger amount than due—To be upheld to the extent claim valid.

Having regard to S. 53 cl. (2), though the patta tendered is found to be incorrect as regards the amount of rent payable, the distraint ought to be upheld to the extent the claim is valid.

Second Appeal from the decree of the District Court of North Arcot in A. S. No. 200 of 1912, preferred against the decree of the Court of the Headquarter Deputy Collector of Vellore in S. S. No. 1 of 1912.

Plaintiff sued to set aside a distraint effected by the defendant for water cess on the ground that the patta tendered was for an amount in excess of what was properly leviable and for damages. The Revenue Divisional Officer found that the rate charged was excessive and setting aside the distraint totally, awarded damages of Rs. 15 to plaintiff. On appeal by the defendant the District Judge of North Arcot affirmed the decision of the Revenue Divisional Officer. Defendant appealed to the High Court.

K. N. Kumaraswami for *L. A. Govindaraghava Aiyar* for Appellant.

Under S.53 Cl. (2) of the Estates Land Act the Court is bound to determine the amount to which the landholder is entitled and sustain the distraint to that extent. The law on the point has been changed by the Estates Land Act and the decisions under the Rent Recovery Act are not applicable. Reference was made to *Rajah Venkata Narasimha* v. *Ravisubbayya* [1].

T. R. Venkatrama Sastriar for Respondent.

The law is not altered. Cl. (2) of S. 53 does not refer to cases of distraint. It refers only to suits for rent. Decisions on the point under the Rent Recovery Act are applicable. The observation in *Raja Venkata Narasimha* v. *Ravisubbayya* [1], is only a dictum.

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*S. A. 2600 of 1912. 25th August 1914.

1. (1911) I. L. R. 35 M. 139 at 140.

Raghunatha Row v. Vellamoonji Goundan

Oldfield J.

The Court delivered the following

Judgments.—*Oldfield, J*:—The learned Judge confirmed the decree setting aside the distraint on the ground that it was for an excessive amount. It is contended here with reference to S. 53 (2) Estates Land Act, that the amount in respect of which the distraint was excessive, should have been ascertained, and that the distraint should have been set aside in respect of that amount only and sustained in respect of the remainder of the demand.

S. 53 (2) is general in its wording. It refers to the patta as enforceable without qualification to the extent, to which it is found to be correct. On its merits appellant's contention would appear to be in accordance with convenience and justice. *Contra* it is argued first that a patta found incorrect to the amount of the demand is not partially correct but totally incorrect, a partially incorrect patta being for instance found correct as to some only of the items of the holding covered by it. No authority has been shown for this contention; and it does not commend itself on its merits.

Next it is urged that S. 53 (2) deals only with the procedure by suit on the patta and provides only for the enforceability of the patta by suit. This is supported on the ground that S. 53 (1) refers to distraint and sale of moveables and to sale of the holding under Chapter VI and that S. 53 (2) must therefore have been intended to regulate the remaining method of recovery provided by the Act, that by suit. This does not in my opinion follow. As observed above, S. 53 (2) contains no restriction of its effect to suits. The use in it of the word "nevertheless" is against the importation of that restriction. And finally such importation is in my opinion negatived by the fact that exchange of patta and muchilika is not under the Act a necessary preliminary to the institution of a suit, and a provision regarding errors in the former could therefore have no effect in connection with one.

We have been referred to the course of decisions under Act VIII of 1865, which contained nothing similar to S. 53 (2). Those decisions therefore do not seem to me material. I observe however that up to 1908, when the Estates Land Act came into force, there was authority for and against claims similar to that

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to appellant and that these cases therefore afford no reason for a decision against him.

In these circumstances the appeal must be allowed. The Lower Appellate Court's decision is set aside and it is directed to re-admit the appeal and dispose of it according to law in the light of the foregoing, after deciding what amount was lawfully recoverable by appellant by his distraint and after dealing with respondent's contention that tender of patta was not proved. Costs to date will abide the result of the re-hearing.

Seshagiri Aiyar J:—I entirely agree. Mr. Venkatrama Sastriar for the Respondent argues that the word ***enforceable*** in clause 2 of S. 53 of the Estates Land Act deals only with suits for rent and not with proceedings by way of distraint. I am unable to find any justification for this contention. Clause (1) makes reference to suits. It makes the tender of patta a condition precedent to the adoption of the distraint proceedings; Clause (2) is by way of exception, the object being to enforce the distraint to the extent to which the patta is correct. If the history of the legislation is looked into, the meaning of the two clauses will be rendered clearer. By S. 7 of Act VIII of 1865, the landlord was precluded from suing for rent or from distraining for it unless he had tendered a proper patta. Under that Act even for suits for rent in Civil Courts, patta should have been tendered. The new Act has expressly enacted that in certain classes of cases, the landlord must sue for rent only in the Revenue Court; at the same time, it removed the restriction that there should be a tender of patta prior to suit. The general principle of the legislation is that in suits for rent, the landlord is not bound to tender a patta before he sues to recover it ....but if he wants to adopt the exceptional remedy of distraint in which he takes upon himself the functions of the Court, although he has to conduct the proceedings with the assistance of the Revenue Officials he must have tendered a patta in order that the Subordinate Revenue Official may have some tangible proof of the landlord's claim. It would serve no purpose therefore to enact in Cl. (2) of S. 53 that the landlord can enforce his claim for rent in a Revenue Court in so far as the patta correctly states it. If the decisions prior to the

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Estates Land Act can furnish any assistance, I feel no doubt that they would support this conclusion of mine. Prior to the passing of the new Act, the predominant view was that a distraint for an excess amount should not be avoided altogether. See *Ramachandra* v. *Narayanaswami*[1] *Bhupati Razu* v. *Ramaswami* [2], *Pitchuviengar* v. *Oliver* [3], *Periakaruppa Pillai* v. *The Manager of the Lessees of the Sivaganga Zemindari* [4]. I do not refer to *Raja Venkata Narasimha* v. *Ravisubbayya* [5], because that was after the Act. For these reasons I agree in the conclusion at which my learned colleague has arrived.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Ayling and Mr. Justice Tyabji.

Muthukrishniengar and others ... *Appellants* * (*Defendants Nos.* 5 6 *and* 7.)

v.

Sankara Narayana Aiyar and another *Respondents* (*Plaintiffs*).

Muthukrishniengar v. Sankara Narayana Aiyar.

Hindu Law—Limitation, art. 144—Adverse possession—Alienee from some of the members—Onus—Knowledge of adverse claim.

Where only some of the members of a Hindu co-parcenary alienate a property in favour of a stranger and the latter takes possession, it is nevertheless incumbent on the latter to prove that his possession was adverse to the knowledge of the other co-parceners before he can make out title by prescription.

Second Appeal from the decree of the Court of the Subordinate Judge of Ramnad at Madura in A. S. No. 933 of 1911 preferred against the decree of the Court of the District Munsif of Manamadura in O. S. No. 536 of 1910.

In this case the plaintiffs and defendants 1 and 2 who were originally co-owners of the suit lands and who were living in Travancore effected an usufructuary mortgage of the suit land situated in the Madura District in favour of defendants 3 and 4 about forty years before suit.—Defendants 1 and 2 went to Madura District several years thereafter and about 1881 sold their rights in the property to defendants 5 to 7 asking them to redeem the usufructuary mortgage. Defendants 5 to 7 accordingly redeemed and contested this suit for redemption of plaintiff's

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* S. A. No. 2391 of 1912. 11th August 1914.

1. (1887) I. L. R. 10 M. 229
2. (1899) I. L. R. 23 M. 326.
3. (1902) I. L. R. 26 M. 260
4. (1907) I. L. R. 31 M. 22.
5. (1911) I. L. R. 35 M. 139

to me to be furnished by the following words of Sankaran Nair J. in *Peria Aiyar Ambalam* v. *Shanmugasundaram* [1]:—

"These decisions also seem to be consistent with principle. When the owner of the property in possession is dispossessed, the trespasser's possession is clearly adverse to him from its inception, as, to his knowledge, the property is held against his will, and he must assert his right within twelve years of his dispossession. But if his mortgagee, who has been placed in possession by him, is followed by another person there is no presumption in law that such possession was taken without any right. He may be an assignee of the mortgagee, or one who purchases the mortgage as a mortgage; or he may be an adverse claimant to the mortgage right; where more than one inference may be drawn, that inference should not be drawn which imputes wrongful act to a person; the defendant has therefore to show that he took possession of this property as absolute property in contradistinction to mortgage property. Nor is this sufficient; as his possession may be consistent with the mortgagor's title, the mortgagor must obviously have notice that he is holding it as absolute property in denial of any right in him. Otherwise no laches can be imputed to him and the possession cannot be said to be adverse."

The judgment of Sankaran Nair J. was delievered when he was sitting in the Full Bench. It was concurred in by the other members forming the Bench and thus deserves special weight. It is true that he was dealing with the case of a person holding possession when a mortgagee was entitled to be in possession, and here we have the case of a person deriving title from a coparcener. But the principle of the decision is applicable. The principle is alluded to by Sankaran Nair J. in the passage cited and is stated in the following striking words by Lord Macnaghten in a case where the assignee of the coparceners who were out of possession were suing the coparcener in possession for partition:—It is clear from what Lord Macnaghten says that the principle underlying these rules of law is not based on any narrow reason specifically applicable only to coparceners in *Corea* v. *Appasamy*[2] and inapplicable to transferees from coparceners. He says, "Assuming that the possession of Iseris

1. (1913) 26 M.L.J. 140 at 150. 2. (1912) A. C. 230 at 235, 236.

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has been undisturbed and uninterrupted since the date of his entry, the question remains, has he given proof, as he was bound to do, of adverse or independent title? His title certainly was not independent. The title was common to Iseris and to his three sisters. On the death of Elias, his heirs had unity of title as well as unity of possession. Then comes the question, was the possession of Iseris adverse? The District Judge held that Iseris 'entered in the character of sole heir or plunderer'. 'Whichever it was', says the learned Judge, 'so he continued, and acknowledged no title in any one else. He has acquired a good prescriptive title'. It is difficult to understand why it should be suggested that Iseris may have entered as 'plunderer'. He was not without his faults. He is described by the learned Judge, who decided in this favour, as 'a convicted forger and thief,' and 'expert not only in crime and incarceration but also in perjury'. But it is perhaps going too far to hold that he was so fond of crooked ways and so bent on doing wrong that he may have scorned to take advantage of the good legal title and may have preferred to masquerade as a robber or a bandit and to drive away the officers of the court in that character. It is not a likely story. But would such conduct, were it conceivable have profited him? Entering into possession and having a lawful title to enter, he could not divest himself of that title by pretending that he had no title at all. His title must have enured for the benefit of his co-proprietors. The principle recognised by Wood, V. C. in *Thomas* v. *Thomas* [1], holds good; "possession is never considered adverse if it can be referred to a lawful title."

Applying these principles there is no reason why the possession of the 5th defendant should be held to have been adverse; his possession can, and ought, it seems to me to be referred to a lawful title derived from the defendants Nos. 1 and 2. That title was not adverse to the plaintiffs.

The second appeal should therefore, in my opinion, be dismissed with costs.

Ayling J.:—I agree.

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1. (1855) 2 K. & J. 79, 83.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Oldfield and Mr. Justice Tyabji.

Muthiah Chettiar and another .. *Appellants* in both (Counter-Petitioners 1 and 2)*

v.

Bava Sahib and others ... *Respondents in both (Petitioner and Counter-Petitioner 3 to 6).*

Muthiah Chettiar *v.* Bava Sahib

Limitation Act, Art. 166—Civil Procedure Code, S. 47—Order XXI, rr. 89, 90 S. 151—Inherent powers—Scope of—Sale contrary to direction in decree—Application to set aside—Limitation for.

Where a sale took place contrary to the direction in the decree that it should take place in a certain order.

Held: per *Oldfield J.* that the application to set aside the sale on that ground was one under S. 47 Civil Procedure Code and would be governed by art. 166 of the Limitation Act.

Art. 166 is not confined to applications under Order 21, rr. 89, 90.

An appeal should not be made to the inherent powers of the court when there is a specific remedy provided by the statute.

Scope of the inherent powers of court considered.

Per Tyabji J :—Order 21, rr. 89 and 90 being inapplicable to the case, the case has to be dealt with under the inherent jurisdiction of the court to which art. 166 would not apply but following the analogy of those rules and art. 166, the court should not exercise its inherent powers when there is no substantial injury or the party has been found guilty of laches by not applying within 30 days as required by art. 166.

Appeal from the order of the District Court of Madura in Civil Miscellaneous Appeal No. 8 of 1913, dated 26th April 1913 preferred against the order of the Court of the District Munsif of Melur in E. A. Nos. 396 and 397 of 1912 and the Civil Revision Petition.

Petition under S. 115 of Act V of 1908 praying the High Court to revise the order of the District Court of Madura in C. M. A. No. 8 of 1913 preferred against the order of the Court of the District Munsif of Melur in E. A. Nos. 396 and 397 of 1912.

C. V. Ananthakrishna Aiyar for the Appellants.

A. Krishnasami Aiyar for *T. Natesa Aiyar* for Respondents.

* C. M. S. A. No. 80 of 1913. 30th September 1914.
C. R. P. No. 798 of 1913.

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Oldfield J.

The Court delivered the following

Judgments :—*Oldfield, J.* This appeal and the Revision Petition relate to an Order by the District Munsif which the District Judge has confirmed, setting aside a sale in the following circumstances. The decree under execution directed the sale of items in a particular order, and the sale proclamation followed it. They were however sold in a different order, and the sale was confirmed. The judgment-debtor then moved the Court successfully under O. XXI, r. 89 of the Code of Civil Procedure. After an appeal against the order dismissing that petition had failed, he applied under O. XXI, r. 90 of the Code of Civil Procedure, obtaining an order excusing his delay in doing so. The District Munsif held that no case for interference under that rule had been established, but set aside the sale in the exercise of his inherent powers. The learned District Judge in the Order under appeal held that the delay could not be excused with reference to Ss. 5 and 14 of the Limitation Act, but that the exercise of the Civil Courts inherent powers was not subject to the law of limitation and was justified by the circumstances of the case. He confirmed the District Munsif's order without deciding explicitly whether there was irregularity in the conduct of the sale or consequent loss, either with reference to R. 89 or generally.

The existence of the inherent powers of Courts was first recognised by statute in the present Code, though it has frequently been the basis of decisions. It is necessary to scrutinise cases, in which it is relied on, closely in order that it may not, owing to that recognition or otherwise lead to arbitrary disposals, actuated by individual sentiment or mere disinclination for the exertion invoked in investigation of the law. It is necessary in order to such scrutiny here to ascertain what the necessity was for resort by the judgment-debtor the petitioner before the District Munsif and the 1st Respondent here, to the inherent powers of the court; that is what remedies he had under the Code of Civil Procedure and what obstacle by way of limitation or otherwise there was to his taking them. The Appellant's contention is shortly that he had his remedy under O. XXI, r. 90 or S. 47 of the Code of Civil Procedure, but

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lost it through his delay, and that in such circumstances the use of the court's inherent powers for his benefit is not justified.

O. XXI, r. 90 of the Code of Civil Procedure deals with the circumstances in which sales may be vitiated by irregularity in their conduct; and here no doubt the complaint was that the court had no jurisdiction to sell as it did because the decree under execution authorised it to sell item 3 only after item 4, instead of, as it did, before it. There was therefore it is argued, not an irregularity to which r. 90 applied but an illegality. Now it is doubtful whether this distinction is open to the 1st Respondent who proceeded statedly under r. 90. Vide *Venkata* v. *Sama* [1], and *Tassaduk Rasul Khan* v. *Ahmed Husain* [2], but I pursue that argument no further, because if the proceedings are not under r. 90 they were certainly under S. 47. In the former case it would have been necessary for the 1st Respondent to prove substantial loss. But in both cases he would have been out of time.

It is not disputed that his petition was presented too late, if it was one under r. 90. If however it was under S. 47 it is urged that Article 181 Schedule II of the Limitation Act applied and he was in time, the special Article No. 166 covering only applications under rr. 89 and 90. This restriction of Article No. 166 corresponds with nothing in its wording, which is absolutely general; and the attempt to impose it has been supported by reference to the fact that the article was substituted for Articles Nos. 166 and 172 in the prior Act of 1877, which related only to applications under Ss. 310 A and 311 of the Code then in force. It is stated that this is borne out by the Statement of Reasons and Objects connected with the present Act. But it has not been shewn how reference to such a statement is a legitimate or necessary aid to the interpretation of a provision, the language of which is clear. The 1st Respondent's application, though it may have been made under S. 47, was one to set aside a sale, and under Article 166 it must be held to have been out of time.

It is not contended here that if the application is subject to the Limitation Act, either S. 5 or S. 14 would have enabled the District Munsif to excuse the delay in its presentation.

1. (1890) I. L. R. 14 M. 227. 2. (1893) L. R. 20 I. A. 176.

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The questions are whether (1) the inherent powers of the Court can be invoked for an object, which resort to its statutory powers could have secured, (2) whether such invocation is subject to any limitation. It may be stated at once that, as (1) must be answered in the negative, there is not likely to be any authority dealing with (2). It is only necessary to add that no doubt Article 181 Schedule II of the Limitation Act, the general article is not exhaustive vide *Devidas Jagjivan* v. *Pirjada Begam* 1 and *Dwarka Nath Misser* v. *Barinda Nath Misser* 2. The cases exempted from it form a well defined class to which further reference will be made, those in which the inherent power exercised is ministerial or impliedly necessary in order to the performance of the Courts' stautory duties.

As regards (1) reliance has been placed mainly on a very widely expressed *dictum* in *Syud Tuffuzzool* v. *Ragoonath Prasad*3 and its adoption in *Gurdeo Singh* v. *Chandrikah Singh* 4 "To proceed as far as the practice of this court will allow him, to recall and cancel an invalid order is not simply permitted but is the duty of a Judge, who should always be vigilant not to allow the act of the Court itself to do wrong to the suitor." By this general statement what did their Lordships of the Privy Council intend to decide? Firstly it may be doubted whether their reference to the practice of the Court was not intended to safeguard the Court's duty to respect, not only the practice but also the law. And next though the application of the *dictum* is somewhat obscure, it is doubted whether it was meant to authorise the unconditional license for which 1st Respondent argued. As appears from the statement of facts, there has been a sale alleged (without contradiction) to have become absolute, of property, which no Court could sell. The Judge set the sale aside, of his own motion though he afterwards heard the purchaser. The observation quoted was made in appeal against the decision in the latter's suit to enforce his right under the sale; and it apparently meant no more than that he could not disregard the order of attachment and rely on the absolute character of the sale, since the discussion of the merits, which follows, could not have been necessary on any other interpretation. It did not mean that such an order of cancellation

1. (1884) I.L.R. 8 B 377.
2. (1895) I.L.R. 22 C. 425.
3. (1871) 14 M.I.A. 40.
4. (1907) 5 C.L.J. 611 at 620.

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created or annihilated rights or was more than declaratory of the void nature of a transaction which was void *ab initio*; and there was no question raised of the order having been passed under any procedure similar to that under S. 47 or of such procedure being available to the aggrieved person. In the other case referred to, it was not suggested that there was any question of the statutory powers of the Court, by the use of which the same result could have been reached; and it may (with all due respect) be doubted whether the reference to the Court's right to recall an erroneous order was necessary or justified, since (for all that appears) the order of transfer to the file of the District Court, which was in question, was proper when it was passed, and a re-transfer appeared necessary on the latter. The case then, as the Judgment also specifies really fell under the other heading of the exercise of inherent power already referred to, that recognised as legitimate in cases not provided for by statute. There again there was accordingly no question, as there is in the present case, of a form of procedure available of which advantage has not been taken.

The distinction between the use of inherent powers proposed in the present case and that, which is permitted in cases not contemplated by statute, may be illustrated by contrast between two sets of decisions, in both of which the cancellation of erroneous orders was in question. In the first *Badaricharya* v. *Ramachandra* [1], *Ram Singh* v. *Babu Kisan Singh* [2] and *Ramachandra* v. *Draupadi* [3] a Court, constituted by special enactment, to whose procedure the Code of Civil Procedure did not apply, was in question and recourse was permitted to its inherent powers to justify a review and its setting aside of an order passed *ex parte*. But in the case of courts subject to the Code of Civil Procedure, it has been held that they are bound by its provisions. In *Reasut Hussain* v. *Hadjee Abdoollah* [4], the District Judge had recalled his erroneous order statedly on the ground that he could do so notwithstanding the absence of "any rule laid down for such a proceeding," in the Registration Act under which this first

1. (1893) I. L. R. 19 B. 113.
2. (1893) I. L. R. 19 B. 116.
3. I. L. R. 20. B. 281.
4. (1876) L. R. 3. I. A. 221.

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order was passed. But the Privy Council holding that the Code of Civil Procedure, applied, devoted its judgment to bringing the case within its provisions. In *Ram Kripal Shukul* v. *Mussumat Rup Kuari* [1], inherent powers were not mentioned but it was held that the adjudication of a competent Court could not be set aside or disregarded by a Superior Court except in an appeal properly preferred. And in *Chandi Charan Laha* v. *Monoranjan* [2], the grant of a review on grounds other than those contemplated by O. 47, R. 1 and in the exercise of inherent powers was held to be unsound; the proper course being to leave the party to seek his remedy in appeal.

The principle to be deduced from the cases referred to and others is clear, that the inherent powers of the Court are not to be used for the benefit of a litigant, who has his remedy under the Code of the Civil Procedure much less than one, who having his remedy has lost it by his own delay. The result is that the decisions of both the lower Courts must be set aside; the appeal against Appellate order being allowed with costs throughout. The case falling under S. 47 the Civil Revision Petition is unnecessary and is dismissed. There will be no order as to costs.

Tyabji J:—It is admitted that the execution sale was not in accordance with the terms of the decree, inasmuch as the decree required that the third item of the property should be sold after the 4th but the 3rd was actually sold before the 4th.

It was not contended on behalf of the appellant that there was no remedy open to the Respondent. It was suggested that a suit may be available to him, but that O.XXI.rr. 89 and 90 provided for cases in which sales could be set aside. That S. 47 of the Civil Procedure Code provided for the *forum* and the method by which those rights were to be enforced; and that as the present case did not come within the terms of those provisions of a self-contained Code, the Court could not add to these provisions any more than to the rules relating to *res judicata*; *Gokul Mandur* v. *Padman Singh* [3]. The answer to this argument seems to me to be that, though the result in this case may have to be brought about by setting aside the sale to which process (S. 47 and rr. 89 and 90 of O. XXI apply) what is sought to be done is primarily to

1. (1883) L. R. 11 I. A. 37. 2. (1913) 17 C. L. J. 416.
3. I. L. R., 29 C. 707 at 715.

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rectify a wrong procedure followed by the Court. The power to rectify their own manifest errors of the kind here in question it seems to me Courts must always have. I am therefore of opinion that the Courts were right in considering the case to fall within their inherent jurisdiction: *Syud Taffzzool Hussain* v. *Raghonath* [1]. I entirely agree, however, with my learned brother that the inherent jurisdiction of the Court is not to be used so as to lead to arbitrary disposals actuated by individual sentiment or the mere disinclination for the exertion involved in the investigation of the law.

The next question is whether the application was barred by limitation. In any view the error was of a nature similar to that in the cases cited by me, and it was within the power and subject to what I am about to say it was the duty of the Court to set its procedure right when its error was brought to its notice. In my view therefore Article 166 of the Limitation Act does not directly apply.

But though the bar of limitation would not, in my view be directly applicable, it seems to me that the Courts would not only be justified in considering the question in the light of the period of limitation allowed by the legislature for applications resulting in a similar way, but that for the reasons I am about state, the Courts are bound to consider it in their light. *Athikarath Nanu Menon* v. *Erathanikat Komu Nayar* [2]. Taking the facts of the present case it seems to me that though there was an error which the Court would have been justified in rectifying of its own motion it was incumbent on it to consider whether the error having been committed, it would be proper to exercise a discretionary jurisdiction arising from its inherent powers. The express inherent powers implies that the power is not conferred by or affected by an act of the Legislature where the Jurisdiction of the court is expressly given by the legislature, it is the legislative jurisdiction that arises and there is no room for speaking of the inherent jurisdiction. In deciding the question whether the Court will exercise its inherent powers it may well proceed on the basis that if the party aggrieved by the error of procedure has acquiesced in the error and has not chosen to apply to the Court with due

1. (1871) 14 M. I. A. 40. 2. (1897) I. L. R. 21 M. 42.

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diligence, his laches would not indeed deprive the Court of the inherent jurisdiction to set right its own error; but indicate that it might be a greater error to set about rectifying a long past error to the detriment perhaps of persons who have honestly proceeded on the basis that the action of the Court was right. Such conduct of the party alleging himself to be aggrieved would also point to the injury suffered by him having been slight. The Court may reasonably take as a guide for the standard of the diligence to be exercised by the parties concerned the provisions of the Indian Limitation Act: and for its guidance as to circumstances which would justify interferences, the provisions of law contained in regard to matters most nearly analogous to those brought in question by reason of the Courts' inherent powers. This will prevent "arbitrary disposal" in the manner above referred to. In the present case by analogy it seems to me that the Courts would have been right in guiding themselves by the provisions of article 166 of the Indian Limitation Act and O. XXI, rr. 89 and 90 of the Civil Procedure Code.

Considering the question in this light I find that there were applications by the Respondent under O. XXI, rr. 89 and 90 both of which were dismissed, and in the course of the decision in the latter (which alone is printed for our use) it is stated that no case for relief under O. XXI, r. 90 was established by which I understand that no substantial injury had been sustained by reason of the irregularity in the sale.

In such a case it seems to me to be clear that the courts exercised their inherent jurisdiction wrongly and their order setting aside the sale should be reversed. I agree therefore in the order proposed by my learned brother.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Sadasiva Aiyar and Mr. Justice Spencer.

Subbiah Servai ... *Petitioner.**

v.

Chokalinga Thevan and others ... *Counter-Petitioners.*

Subbiah Servai *v.* Chokalinga Thevan

Criminal Procedure Code, S. 145—Order for payment of costs—Memorandum of costs filed—Assessment of costs not made by negligence in office—Death of petitioner—Application by son—Delay—No ground for rejecting—Successor's power to make order—Necessity for bringing legal representatives on record.

Where an order for payment of costs to the petitioner had been duly made by a magistrate in a proceeding under S. 145, Criminal Procedure Code and though the memorandum of costs had been filed and an order made by him to the office to "check and include the costs," owing to some negligence in the office, the costs were not actually taxed and nearly 3 years after the petitioner's son (the petitioner having died in the meanwhile), made an application to the successor of the Magistrate who disposed of the case to assess the costs.

Held that the order could be made by the successor and even though the legal epresentatives of the deceased had not been brought on the record.

Held further that the delay in applying was not a ground for rejecting the application as it was only a reminder to the Court to do its duty.

The Code of Criminal Procedure contains no special provisions for bringing on record representatives of deceased parties. All that the court has to see is that the appeal or application has not abated by the death of one of the parties.

Mahomed Ershed Ali Khan Chowdhury v. *Sarada Prasad Shaha* (1) followed, *Bhojal Sonar* v. *Nirbhan Singh* (2) dissented from.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure of 1898 and S. 15 of the Charter Act praying the High Court to revise the order of the Court of the Sub-Divisional Magistrate of the Puttukotta Division.

One Kandasami Servai, a petitioner, under S. 145, Criminal Procedure Code, was ordered to be placed in possession of the disputed lands, by the Sub-Divisional Magistrate of Pattukottai, who also directed the counter-petitioners to pay the costs of the petitioners. This order was passed on the 24th August 1910. A memorandum of costs, for Rs. 255-8-0, was put in, on the 25th

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* Cr. Rev. C. No. 77 of 1914. 26th August 1914
Cr. R. P. No. 66 of 1914.

1. (1895) I. L. R. 23 C. 87. 2. (1894) I. L. R. 21 C. 609.

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August 1910, by one of the Vakils for the Petitioner and the other put in another memorandum for Rs. 44-0-0 on the 27th August 1910. On the latter memorandum the Magistrate passed an order, "check and include," under his initials dated the 27th August 1910. The petitioner having died, his son put in a petition, on the 14th June 1913, to assess the costs, before the then Sub-Divisional Magistrate.

The Magistrate passed the following order on the application :—

"Subbaroya Servai has no right to put in this petition without being brought on record, as the legal representative of the deceased. Even granting that he has right to present this application there has been long delay in presenting it to this Court......A lapse of nearly three years cannot be considered to be a resonable delay."

P. R. Narayanaswami Aiyar for Petitioner.

Narasimham Counsel for the Counter-petitioner.

S. Sydney Smith for the Public Prosecutor for Government.

P. R. Narayanasami Aiyar, proceedings do not abate by reason only of the death of one party (cl. 7 of S. 145). And the court may therefore hold the son as a party. There is nothing to prevent the Court from adding him as a legal representative, as the Code is silent on the point. Lastly if he is not so added, the order of Court becomes infructuous.

As for the second objection, there is really no delay. All that the party has to do is to put in a memorandum of costs, which has been done in this case, within after three days of the order. It is the duty of the Court, to assess the costs. The son's petition was only a reminder. The Magistrate was wrong in holding that the delay was unreasonable.

Sydney Smith.—There is no provision in the Code to bring in the legal representative. It has been held in *Bhojal Sonar* v. *Nirbhan Singh* [1] that a succeeding Magistrate cannot tax costs.

P. R. Narayanaswami Aiyar, Bhojal Sonar v. *Nirbhan Singh* [1] has been overruled by *Mahomed Ershed Ali Khan Chowdhry* v. *Saroda Prasad Saha* [2] and *Girdhar Chatterjee* v. *Abdulla Nashkar* [3].

1. (1894) I. L. R. 21 C. 609. 2. (1896) I. L. R. 23 C. 87.
3. (1895) I. L. R. 22 C. 384.

Subbiah Servai v. Chokalinga Thevan

Spencer, J.

The Court made the following

Order: *Spencer J*:—In proceedings under S. 145 of the Code of Criminal Procedure M. R. Ry., P. S. Vasudeva Rao, the Sub-Divisional Magistrate passed a final order which included a direction that the counter-petitioner should pay the petitioner's costs. Within 3 days after the order of the 24th August 1910, two memoranda for taxing costs were put into Court by the petitioner's vākils. The Magistrate passed an order on the second of these memoranda "check and include" but through some negligence in the Magistrate's office, costs were not actually taxed.

Nearly 3 years later, the petitioner's son applied to the Magistrate's successor in office for costs being assessed, the petitioner having died in the interval.

The Magistrate has rejected his application on the ground (1) that the petitioner's son had not been brought on record as legal representative of his deceased father (2) that there had been great delay in applying.

The first objection is not good. The Code of Criminal Procedure contains no special provisions for bringing on record representatives of deceased parties. All that the Court has to see is that the appeal or application has not abated by reason of the death of one of the parties.

The delay might have been overlooked if the son's petition had been treated as a reminder to the Court to do that which it should have done when the memoranda were presented.

The respondent's Counsel and the Public Prosecutor have raised another question which is whether the successor of the Magistrate who decided the case has no jurisdiction to assess the amount of the costs.

I think that this has been rightly settled in the affirmative by the decisions in *Mahomed Ershed Ali Khan Chowdhry* v. *Saroda Prasad Shaha*[1] which dissented from *Bhojal Sonar* v. *Nirban Singh*[2] and followed *Girdhar Chatterjee* v. *Ebadullah Naskar*[3], and *Binoda Sundari Chowdhurani* v. *Kalikristo Pal Chawdhury*[4].

We set aside the Magistrate's order and direct him to pass orders, assessing costs in the case.

1. (1895) I. L. R. 23 C 37.
2. (1894) I. L. R. 21 C. 609.
3. (1895) I. L. R. 22 C. 384
4. (1895) I. L. R. 22 C. 387

Subbiah Servai v. Chokalinga Thevan — Sadasiva Aiyar J.

Sadasiva Aiyar, J:—I entirely agree. Courts should always leau in favour of that view of the law which would enable a party who has got an order in his favour to obtain the fruits of that order and not in favour of highly technical objections which render the Court's order infructuous and a mere piece of waste paper. Courts have the power within reasonable limits to invent rules of procedure for this purpose when the legislature has not enacted such rules unless the legislature prohibits them from doing so.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Miller.

Jelagan Subramania Naidu ... *Petitioner** (*Complainant.*)

v.

K. Singara Mudali ... *Respondent* (*Accused.*)

Subramania Naidu v. Singara Mudali

Workman's Breach of Contract Act (*Act XIII of 1859*)—*Agreement to payment of advances by deducting from wages.*

A contract for work providing for a portion of the wages going periodically in reduction of the advance falls within the scope of the Workman's Breach of Contract Act.

Queen v. *Tulukanam.* (1). *Tangi Joghi* v. *Hall* (2), Referred to.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure 1898, praying the High Court to view the order of the 20th February of the Court of the 3rd Presidency Magistrate George Town Madras in Calendar Case No. 2859 of 1913.

S. Krishnamachariar Vakil for the Petitioner.

Respondent was unrepresented.

The Court made the following

Order:—The cases in this Court bind me to set aside the. Presidency Magistrat's order. Case in which the contract is that the workman shall work for wages deducting from his wages a certain sum periodically to make good an advance, has been held in this Court to be within the Act XIII of 1859. *Vide*. The *Queen* v. *Tulukanam* [1], *Tangi Joghi* v. *Hall* [2] (as to part of the advance in that case) and the recent case, Criminial Revision Case No. 120 of 1913 (Case Referred No. 13 of 1910),

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* Cr. R. C. 543 of 1913.

1. (1883) I. L. R. 7 M. 131. 2. (1899) I. L. R. 23 M. 203.

Subramania Naidu *v.* Sinara Mudali.

where Benson and Tyabji JJ. following the other cases declined to follow the one (Cr. R. C. No. 674 of 1912) on which the Presidency Magistrate relies.

The order is set aside, and the case should be restored to file and dealt with according to law.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sankaran Nair and Mr. Justice Ayling.

S. Paramananda Nadar ... *Petitioner**
v. (*Complainant.*)
Karunakara Doss and another ... *Respondent*
(*Accused.*)

Paramananda Nadar *v.* Karunakara Doss

Cr. Pr. Code S. 248—Complaint under authority of Municipal Secretary—District Municipalities Act S. 39 A, S. 280—Municipal Council—Withdrawal by—Ultra vires.

It is not competent to the Municipal council to withdraw a complaint instituted by the complainant by virtue of an authorisation by the Municipal Secretary to whom the powers of the Chairman under S. 280 of the District Municipalities Act had been delegated under S. 39 A.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Second Class Magistrate of Palamcottah in C.C. No. 49 of 13.

T. Venkatarama Aiyar Vakil for the Petitioner.

M. D. Devadoss Counsel for the respondent and of the Public Prosecutor on behalf of the Government.

The Court made the following

Order:—The complaint in this case was preferred by the present petitioner purporting to act in virtue of an express authorisation by the Municipal Secretary to whom the powers of the Chairman under S. 280 District Municipalities Act are said to have been delegated under S. 39 A. It is clearly not competent for the Municipal Council to withdraw the complaint and the complainant has not withdrawn it—

We set aside the order of acquittal passed under S. 248 of the Criminal Procedure Code and direct the Magistrate to restore the case to his file and dispose of it according to law.

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* Cr. R. C. 305 of 131. 17th February 1914.
Cr. R. P. 253 of 13.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Kumarasami Sastri.

Desayi *alias* Allam Raju Nanjunadhiah... *Appellant** (*1st Defendant*)

v.

Desayi *alias* Allam Raju Venkatasubbiah ... *Respondent* (*Plaintiff*).

Deseyi *alias* Allam Raju Nanjunadiah *v.* Desayi *alias* Allam Raju Venkatasubbiah.

Pensions Act S. 4—Land granted as Desai inam to manager joint family Presumption for family—Suit for partition—Maintainability without certificate—Jurisdiction—civil courts.

Where land has been granted as inam to the managing member of a joint Hindu family he must be deemed to have taken the property for and on behalf of the family. *Gunnaiyan* v. *Kamakchi Iyer* (1) followed.

The Pensions Act has no application to a suit among the members of the family of the grantee of the Inam for partition of the land granted as Inam and the civil courts have jurisdiction to entertain the suit without a certificate under the Pensions Act.

Panchonada v. *Neelakanta* (2) *Jeyambha* v. *Secretary of State for India* (3) *Secretary of State* v. *Subbarayudu* (4) *Ravji Narayan Mandlik* v. *Dadaji Bapuji Desai* (5) *Mannu Lal* v. *Fazal Imam* followed (6) *Rama* v. *Subba* (7) distinguished.

Second Appeal from the Decree of the District Court of Kurnool in A. S. No. 31 of 1912 preferred against the Decree of the Court of the Subordinate Judge of Kurnool in O. S. No. 1 of 1908.

T. R. Ramachandra Aiyar and *T. R. Krishnaswami Aiyar* for Appellant.

K. Narain Rao for Respondent.

The Court delivered the following

Judgment:—This second appeal is argued only with reference to items 56 to 58. The Courts below have held that plaintiff was entitled to a share in them. The 1st defendant's (Appellant's) contentions are twofold. He says that as the properties came to him from Thimma Raju who was the last holder of this

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* S. A. No. 2110 of 1913 11th August 1914.

1. (1902) I. L. R. 26 M. 339.
2. (1882) I. L. R. 7 M. 191.
3. (1912) 23 M. L. J. 687.
4. (1912) I. L. R. 36 M. 559.
5. (1875) I. L. R. 1 B. 523.
6. (1911) I. L. R. 33 A. 580.
7. (1888) I. L. R. 12 M. 98.

Desayi *alias* Allam Raju Nanjunadiah *v.* Desayi *alias* Allam Ruju Venkata-subbiah.

Desai Inam the other members of his family can have no claim to them. It is found that at the time of the devolution, he was the manager of the undivided family of which plaintiff was a junior member. He must therefore be deemed to have taken the property for and on behalf of the joint family. The principle of the decision in *Gunnaiyan* v. *Kamachi Ayyar*[1] applies to this case. We hold that the properties are not 1st defendant's self acquisition. The more important question relates to the jurisdiction of the Civil Courts to entertain the suit without a certificate under the Pensions Act. The finding of the Courts below, we take to be, that the grant to Thimma Raju's ancestors was of the land itself. There has been no suggestion that the original grantees had any Kudivaram right in the soil prior to the grant to them. These considerations have to be borne in mind in deciding whether the Pensions Act applies to this case. S. 4 interdicts the filing of suits relating to pensions, grant of land revenue or grant of money without a certificate. Whether *grant of land* is included in the term pension has been much debated. It is pointed out by Collins C. J. and Muthusami Aiyar J. in *Rama* v. *Subba* [2], that the object of the enactment (The Pensions Act) was to prohibit parties from filing suits in Civil Courts in all cases of Inams, without the knowledge of the Government. The learned Judges inclined to the view that as the Government is entitled to the reversion, if they choose to exercise their right, the legislature has made it a condition precedent to the maintainability of these suits, that a certificate from them should be filed. These observations are of great value in considering the right of an alienee to recover possession of an Inam. When applied to a claim among the members of the family for partition, they have not the same significance. The learned Judges also observe at page 103, "These decisions show that in order that a grant of villages may not fall under the Pensions Act, it must be a grant of the freehold therein or full ownership in the soil, qualified in no way by any reversion suggested by the terms of the grant in regard to future succession or transmission." The import of this passage seems to be that if the grantee was possessed of the Kudivaram right at the time of the grant and all that the Government did

1. (1902) I. L. R. 26 M 339 2. (1888) I. L R. 12 M 98.

Desayi *alias* Allam Raju Nanjunadiah *v.* Desayi *alias* Allam Raju Venkata-subbiah.

was to transfer to him their right of land revenue, the Pensions Act will be a bar. It is true that where the Kudivaram has vested in the family and the Government conferred the Melwaram right later on, it is unlikely that the two rights should nave been kept separate. In the passage already quoted all that the learned Judges intended to lay down was that at the time of the suit, the Courts should apply their minds to the state of affairs which existed at the time of the grant. In the present case, as we prefaced, there is nothing to indicate that the grantees were the owners of the Kudivaram right and that the grant to them was only of the land revenue. The authorities to which we shall presently refer lay down that where there has been a grant of land, the Pensions Act is inapplicable. We have referred to *Rama* v. *Subba*[1] at some length having regard to the fact that one of the learned Judges who took part in that decision held the position of Inam Commissioner at one time. Our conclusion is that in cases of partition of the land granted as Inam among the members of the grantee's family, the pre-requisite of filing a certificate under the Act has no application. This is supported by a large number of decided cases. *Panchanada* v. *Neelakanda* [2] lays this down in distinct terms. It has been approved and followed in *Jeeyamba Bai* v. *Secretary of State for India* [3], and the *Secretary of State* v. *Subbarayadu* [4]. The Bombay High Court in *Ravji Narayan Mandlik* v. *Dadaji Bapuji* [5], has taken the same view. *Mannu Lal* v. *Fazal Imam* [6], is to the same effect. Following these decisions we must hold that the Courts below are right in deciding that their jurisdiction was not ousted by the Pensions Act. We dismiss the second appeal with costs.

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1. (1888) I. L. R. 12 M 98.
2. (1883) I. L. R. 7 M 191.
3. (1912) 23 M. L. J. 687.
4. (1912) I. L. R. 36 M 559
5. (1875) I. L. R. 1 B 523.
6. (1911) I. L. R. 33 A 580.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Sir John Edward Power Wallis Kt. Officiating Chief Justice and Mr. Justice Kumarasami Sastri

Adaikalam Chetti ... *Appellant** (*Plaintiff*)

v.

Subban Chetty and others ... *Respondents* (*Defendants Nos. 2 to 12*).

Adaikalam Chetti *v.* Subban Chetty.

The Offg. Chief Justice.

Hindu Law—Joint family—Mortgage in favour of one of the members—Funds belonging to the family—Right of suit without joining the other members—Manager—Right to sue—Disputes in the family or revocation of authority by others—Effect of.

Where a mortgage was taken by a member of a joint Hindu family in his own name out of funds belonging to the family but without disclosing that he was acting as agent of the family

Held that he was entitled to sue on the mortgage without joining the other members.

Per Kumaraswami Sastry J :—The right of the manager to sue on contracts entered into with him cannot cease by the mere fact that there are disputes in the family or that the other members affect to revoke his authority to act on their behalf.

Appeal from the decree of the Court of the Subordinate Judge of Tanjore in O. S. No. 49 of 1906.

T. Narasimha Aiyangar for Appellant.

T. Rangachariar L. A. Govindaraghava Aiyar and *L. S. Viraraghava Aiyar* for Respondents.

The Court delivered the following

Judgments :—*Wallis Offg. C. J.* I have had the advantage of reading the judgment of my learned brother and shall only deal with the right of the plaintiff a member of a joint family to maintain a suit to recover money belonging to the joint family advanced by him on mortgage to the defendants without joining the other members of his family interested in the money.

According to the view we take of the facts and for reasons given in the judgment of my learned brother we hold that the money was advanced to the mortgagees without disclosing that it belonged to the joint family, and at a time when the plaintiff was not the managing member of the family. It was held in

* A. 189 of 1909. 10th August 1914.

Adaikalam Chetti v. Subbau Chetty.

The Offg. Chief Justice.

Adaikhalam Chetti v. *Marimuthu* [1], and other cases that in the cases of a joint family where the contract was in the name of the plaintiff he was entitled as the agent of an undisclosed principal to sue on it himself without joining the other members of the family. This decision, it is true, was not approved of in *Seshan Pattar* v. *Veeraraghavan Patter* [2], but appears to me to be supported by the recent ruling of the Privy Council in *Kishen Preshad* v. *Har Narayan Singh* [3], where the fact that the contract was properly entered into by the plaintiff, was, it seems to me, treated as one of the grounds entitling him to sue. I do not find anything inconsistent, with the proposition in the judgment of *Benson* and *Sundara Aiyar, JJ.* in *Sheik Ibrahim Tharagan* v. *Rama Aiyar* [4]. The bond in that case had not been taken in the name of the managing member, who brought the suit, but in the name of another member who was joined as the 16th defendant. Certain payments to 16th defendant were held bad on the ground that they were fraudulent but there is no suggestion that in the absence of fraud he could not have sued himself. He had not done so, and the managing member sued as such making him a defendant. The second question in the appeal was whether the managing member could maintain the suit without joining all the members of the joint family in addition to the member who had taken the bond. It was held that he could, and the learned Judges referred to the decision of the Privy Council in *Kishen Pershad* v. *Har Narayan Singh* [3] in support of their view that in such a suit the managing member was entitled to represent the family. The observation at the bottom of p. 690, as I read it, means no more than that their Lordships did not rest their decision solely on the ground that the contract sued on was in the name of the managing member. In any case this point was not before the learned Judges for decision. I agree that the appeal must be allowed with costs and on the other terms in the order of my learned brother.

Kumaraswami Sastri J :—The plaintiff, who is the appellant, sues to recover Rs. 13,000 alleged to be due on a mortgage in his favour, dated 13th August 1895, and Rs. 4000

1. (1899) I. L. R. 22 M. 326.
2. (1909) I. L. R. 32 M. 284. s. c. 19 M. L. J. 372.
3. (1911) I. L. R. 33 A. 272. s. c. 21 M. L. J. 378.
4. (1911) I. L. R. 35 M. 685. s. c. 21 M. L. J. 508.

due to him and 2nd defendant on a subsequent mortgage dated 21st June 1888 executed by the 1st defendant in favour of the 2nd defendant and two others and in respect of which the plaintiff got assigned to him two of the shares of the other two persons.

The case for the plaintiff was that he and the 2nd defendant were divided and that the money claimed belonged to him. Various defences were raised by the defendants, but, for the purpose of this appeal, it is only necessary to consider a few of them. One defence was that the moneys claimed were not due to the plaintiff alone but to the plaintiff and his brothers who were members of an undivided family and that the plaintiff was not entitled to maintain the suit without joining all those who were interested in the mortgage money. Another defence was that the plaintiff was not entitled to sue for his money by a sale of the properties as the mortgage was a usufructuary mortgage. It was also pleaded that the suit was barred by limitation. The Subordinate Judge held that, though the mortgage for Rs. 13,000, was obtained by the plaintiff in his name, it was obtained by him as a member of an undivided family and that the loan was advanced out of family funds.

As regards the claim for Rs. 4,000, he held that it was not proved that Rangan Chetty, one of the plaintiff's assignors, received consideration for the transfer and that consequently the transfer Exhibit B was not valid. He held that the suit was not barred by limitation, as the bond contained a covenant to pay and was not a purely usufructuary mortgage. He dismissed the suit on the ground of non-joinder of the other persons interested in the mortgage money.

As regards the finding of the Subordinate Judge on the 1st issue, I am of opinion that the plaintiff has not proved that the mortgage money was his separate or self-acquired property. It is not denied that the plaintiff and his brothers were at one time joint members of a family owning extensive properties. The plaintiff has not proved that on the date of Ex. A there was a partition between himself and his brothers and it is not shewn how he acquired Rs. 13,000. The 2nd defendant no doubt admits that on the date of Ex. A, the plaintiff was living separately, but mere separate living will not entitle the plaintiff to use

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properties, which were joint properties and which were not divided, so as to give him an absolute title to the mortgage money lent by him out of such funds. The question however is whether the mere fact that others are entitled to an account of the mortgage money and to a share therein would make them necessary parties to the suit. It appears from the document Ex. A, that it was taken in the sole name of the plaintiff without reference to any other person and the Appellant's Vakil argued that it was open to the plaintiff to sue in his own name (1) because the contract was between himself and the 1st defendant without disclosing the fact that the plaintiff was acting for any body else or using the funds of third parties and consequently he should be deemed to be in the position of an agent contracting for undisclosed principal and (2) because the plaintiff who on the findings of the Subordinate Judge, must be taken to be the managing member of the family can maintain the suit on the mortgage which was taken in his own name without joining the other members of the family who may be interested in the mortgage money.

As regards the first point, the evidence on record shows that, though there was no actual partition by metes and bounds the plaintiff was living separately from his brothers for several years. The separate living is spoken to by the plaintiff and his witnesses and the 2nd defendant in his evidence admits that at the time of the execution of Ex. A (deed of mortgage for Rs. 13,000) the plaintiff was not living in the family but taking his meals separately. It also appears from the evidence that there was an ineffectual attempt to effect a partition by metes and bounds. The position, therefore, was that the plaintiff at the date of the mortgage Ex. A, was living separately and that he took the mortgage in his own name with funds in which his brothers were interested, and had a share. The evidence of the plaintiff and his brothers leaves no room for supposing that, when he lent the money, the plaintiff was acting as the managing member of an undivided family or was representing any interests but his own. Where a person purporting to act for his sole benefit, uses funds in which his brothers have a share the fact that he may be accountable to his brothers affords no ground for dismissing the suit on the mortgage for non-joinder.

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It is not the case of a member of an undivided family suing in respect of a mortgage taken by the member of a family, and the mere fact that the plaintiff used family funds to obtain the benefit for himself will not entitle the mortgagor to question the plaintiff's rights to enforce the contract between the parties. The position of the plaintiff in such a case could not be worse than that of a benamidar and it has been held in *Sachinanda Moha Patro* v. *Baloram Gosain* [1], that a benamidar can sue to recover his dues on a mortgage taken in his name.

In *Adaikhalam Chetti* v. *Mari Muthu* [2], it was held that the mortgagee can sue to recover the mortgage money due on a bond taken in his sole name without joining the other members of the family even though he might be a member of an undivided Hindu family. The ground of the decision was that the contract on which the suit was based was in his sole name and did not purport to have been obtained by him on behalf of any others but himself. The recent decision of the Privy Council in *Kishen Pershad Singh* v. *Har Narayan Singh*[3] supports the view taken in the above case. It is argued that though living separately plaintiff who was dealing with family moneys must be treated as the agent for the other members of the undivided family and that in such case the contract is really with all the members of the family. Even if plaintiff was the agent I am of opinion that he can sue alone as he did not disclose that he was acting for the other members of the family. In *Bungsee Singh* v. *Soodit Lall* [4] the right of the mortgagee to sue on the mortgage was upheld on the ground that the plaintiff should be regarded as contracting not only on behalf of himself but on behalf of undisclosed principals *i.e.* the other members of the family. As this case was cited with approval in *Adaikhalam Chetti* v. *Mari Muthu*[2] it must be taken that their Lordships approved of the principle on which the decision was based. A similar view was taken in *Gopal Das* v. *Badri Nath* [5]. Having regard to the fact that the plaintiff while living separately was using family funds to obtain a mortgage in his own name, it is hardly likely that he would have disclosed to the mortgagor the

1. (1897) I. L. R. 24 C. 644. 2. (1899) I. L. R. 22 M. 326.
3. (1911) I. L. R. 33 A. 272. 4. (1881) I. L. R. 7 C. 739.
5. (1904) I. L. R. 27 A. 361

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fact that he was using family funds or was acting on behalf of any body except himself. The 1st defendant, who is the *mortgagor* does not state that at the time of the mortgage the plaintiff disclosed the name of any other person as having an interest. He admits that the mortgage deed was executed in plaintiff's name and simply states that the 2nd defendant, Rangan Chetti and Vydilingam Chetti referred to in the plaint are undivided. It is not pleaded and there is no evidence on record to show that the plaintiff did at the time of making the contract disclose that he was contracting not only on behalf of himself but also on behalf of the other members of the family. In *Bungsee Singh* v. *Soodhit Lall* [1], and *Gopal Das* v. *Badri Nath* [2] it was held that the onus of proving the plea is on the defendant. I am, therefore, of opinion that the plaintiff is entitled to sue on a mortgage obtained by him in his sole name while he was living separately from his brothers and that the mere fact that his brothers had an interest in the funds would afford no defence to the mortgagor in a suit filed on the mortgage. Even assuming that the plaintiff was on the date of the mortgage in the position of the managing member of an undivided family, the decision of the Privy Council in *Kishen Pershad* v. *Har Narain Singh* [3] is a clear authority for holding that the managing member of an undivided family can sue on a contract entered into by him in his own name without joining the other members of the family. The ground upon which their Lordships based their decision is that it was competent for the managing member to enforce at law contracts which he was entitled to make or discharge in his own name and that the defendant while entitled to insist that all persons with whom he *expressly* contracted should be made parties, is not entitled to demand that persons who were merely interested in the profits of the transaction should be treated as parties necessary to its enforcement.

It is argued for the Respondents that the right of the managing member to sue on contracts entered into by him in his own name ceases as soon as disputes arise in the family or if any member begins to live separately. I am unable to find any authority for this broad proposition. The only ground on which

3. (1881) I. L. R. 7 C. 739. 2. (1904) I. L. R. 27 A. 361.

3. (1911) I. L. R. 33 A. 272. s. c. 21 M. L. J. 378.

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Kumarasami Sastri J.

it can be supported is that the sole right to sue is based on the right of the managing member to represent the family in all transactions affecting the family and that such right ceases on the other members of the family revoking the authority of the managing member to bind them. There are no doubt observations in *Sheik Ibrahim Tharagan* v. *Rama Aiyar*[1] to the effect that the right of the managing member to sue on a contract entered into with him without joining the other members is based on the theory that he completely represents the family in all transactions with other parties but their Lordships of the Privy Council rested the decision on broader grounds. Their observations at pages 276 and 277 make this clear. If the right of the plaintiff to sue without joining the other members of the family rests on the general principle of law, that the person in whose name the contract is made can enforce it without joining persons simply interested in it, the fact that there are disputes between the plaintiff and those interested would be no ground for holding that he has lost the sole right of suit. It would of course be open to those who have an interest in the mortgage money to apply to be made parties to the suit and even if they do not do so the Court has the power to safeguard their interests. There is no reason why the mortgagor whose contract was with one member of the family, should take advantage of the disputes between the members and withhold a payment which under his contract, he was legally bound to make to the person with whom he mortgaged the property. I am of opinion that the Subordinate Judge was wrong in dismissing the suit on the mortgage Exhibit A on the ground of non-joinder.

As regards the claim of Rs. 4000 it is difficult to see how the decision of the Subordinate Judge can be supported. The mortgage was in the name of the 2nd defendant and two of his brothers, Rangan Chetti and Vythilingan Chetti. Exhibit B and B 1 are transfers by Rangan Chetti and Vythilingan Chetty to the plaintiff of their interests in the mortgage. These documents which were duly executed on the 6th January 1906 and 28th December 1905, were registered. The evidence that the consideration for Rangan Chetti's assignment was not paid is very meagre. Even assuming that the consideration was

1. (1911) I. L. R. 35 M. 685 s. c. 21 M. L. J. 508.

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not paid it would not invalidate the transfer, as mere non-payment of consideration would be no ground for holding that property did not pass. The question as to consideration is one between the transferor and the transferee and it is difficult to see how the mortgagor can take advantage of the non-payment of consideration for the assignment.

The appellant's Vakil states that the appellant is willing to give such security as the Court may direct to safeguard the interests of the 2nd defendant and the other members of the family who might be interested in the mortgage money. I am of opinion that their interests will be sufficiently safeguarded by requiring the appellant to give security to the satisfaction of the Subordinate Judge before he executes the decree.

I would therefore reverse the decree of the Subordinate Judge and pass a decree for the plaintiff as prayed with costs in this and in the lower Court. There will be the usual mortgage decree. Time for redemption six months.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sankaran Nair and Mr. Justice Ayling.

Govinda Chetti and others ... *Petitioners**

v.

Emperor

Criminal Procedure Code, S. 144—Renewal of order—No special urgency or necessity—Ultra vires.

Where an order under S. 144 purported to renew an earlier order passed under that section without any indication that there was any special urgency or necessity to pass such order.

Held that the order was *ultra vires* as in effect it contravened the provisions of cl. (2).

Petition under Ss. 435 and 439 of the Criminal Procedure Code 1898 and S. 15 of the Charter Act, praying the High Court to revise the order of the Sub-Magistrate of Salem Town.

L. A. Govindaraghava Aiyar for Petitioner.

The Public Prosecutor for Government.

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* Cr. R. C. No. 686 of 1913. 21st October 1913

Cr. R. P. No. 517 of 1913.

Govinda Chetti v. Emperor.

The Court made the following

Order. In our opinion the order of the Sub-Magistrate which we are asked to revise, does not satisfy the requirements of S. 144 Criminal Procedure Code and must be considered to be passed without jurisdiction. S. 144 applies to temporary orders in urgent cases of nuisance or apprehended danger, and it is distinctly provided that, except when specially extended by a notification of Government no such order shall remain in force for more than 2 months. Neither in the present order itself nor in the records referred to as forming the basis of it, is there any indication of urgency and the order itself does not set forth the material facts of the case as required by law. The order purports to review a previous order prohibiting the Pathiyar procession for two months from 3rd July 1913. It is in effect a second extension for 2 months of an order dated the 2nd May 1913 prohibiting the procession.

It is open to the District Magistrate to address Government for issue of a certificate under clause 5 of the section: but the present order is in contravention of the same and *ultra vires.*

It is hereby set aside.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Ayling and Mr. Justice Hannay.

Guruswami Naiken and others ... *Accused in Calendar Case No. 702 of 1913 on the file of the Stationary Sub-Magistrate of Udumalpet.**

v.

Tirumurthi Chetty .. *Complainant.*

Guruswami Naiken v. Tirumurthi Chetty.

Criminal Procedure Code, Ss. 422, 250—Appeal to joint Magistrate from order of compensation by Sub-Magistrate—Notice to District Magistrate—Absence of—Not ground for interference at the instance of accused.

The person to whom notice ought to go on an appeal to a joint Magistrate from an order awarding compensation made by a second class Magistrate is the District Magistrate but want of such notice is not a ground for setting aside the order passed on appeal at the instance of the accused when no steps are taken for that purpose by the District Magistrate himself.

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*Crl. R. C. 456 of 1914.
Case referred No. 52 of 1914. 13th October 1914.

Guruswami Naiken v. Tirumurthi Chetty.

Case referred for the orders of the High Court under S. 438 of Criminal Procedure Code by the Sessions Judge of Coimbatore in his letter dated 11th July 1914.

G. Krishnasami Aiyar for Accused.

C. S. Venkatachari for Complainant.

P. R. Grant for Government.

The Court delivered the following

Judgment:—The order which we are asked to revise was passed by the Joint Magistrate of Pollachi Division setting aside on appeal an order of the Stationary Sub-Magistrate of Udumalpet for payment of compensation under S. 250 Criminal Procedure Code.

The Sessions Judge of Coimbatore has referred it as illegal on the ground that no notice of the appeal was given to the Public Prosecutor as required by S. 422, Criminal Procedure Code.

S. 422 of the Criminal Procedure Code directs that notice of appeal should be given "to such officer as the Local Government may appoint in this behalf:" and a reference to rule 60 of the Criminal Rules of Practice shows that the only officer who can be held to be appointed to receive notice of an appeal of this kind is, not the Public Prosecutor but the District Magistrate, who is nominated in clause (1) "for appeals other than appeals to Courts of Session."

We may remark that as far as our experience goes this clause is very generally disregarded throughout the Presidency, and it may be doubted whether it was really intended to apply to compensation cases. But, as it stands, it is certainly applicable and we have merely to decide whether the disregard of it is a sufficient ground for interference with the Joint Magistrate's order. On the whole we think it is not. In *Emperor* v. *Palaniappa Velan* [1] the Officiating Chief Justice Sir Subrahmania Aiyar sitting alone set aside the order in a case indistinguishable from the present one, but expressed himself in very guarded language. He remarked that there seemed little reason for notice to the officer appointed by Government in a matter in which the accused only are really interested: and appears to have been mainly influenced by the failure to give notice to the accused, so

1. (1905) I. L. R. 29 M. 187.

Guruswami Naiken v. Tirumurthi Chetty.

that the latter might have an opportunity of supporting the order passed in their favour. In a later case *Ambakkagari Nagi Reddi* v. *Basappa of Madimakulapalli* [1], a bench of this Court declined to interfere on the ground of failure to give notice to accused, seeing that this was not required by bye-law: but remarked that notice to the Public Prosecutor (sic) was clearly necessary whether they would have deemed its omission sufficient ground for interference is not clear.

Notice to the District Magistrate is practically a formality in an appeal of this description; for there can be very few cases in which that officer would deem it necessary to oppose the appeal. It cannot be said either of the parties really concerned was prejudiced by its omission. The accused has no right of audience in such an appeal and cannot count on the support of the District Magistrate. The Joint Magistrate's order is in favor of the complainant. The District Magistrate himself has not moved in the matter; and the Public Prosecutor does not support the reference.

We decline to interfere.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sankaran Nair and Mr. Justice Spencer.

M. P. Chidambaram Chetti and others ... *Appellants* * (*Defendants*)

v.

S.R.M. A. R. Ramaswami Chettiar and others... *Respondents* (*Plaintiffs*)

Chidambaram Chetti v. Ramaswami Chettiar.

Family partnership—Nattukottai Chetti—Usage—Family property and trade assets—No difference between—Limitation Act, S. 19—Name of the family deity—" Signed "—Acknowledgment by partner—Manager of the family—Mode of discharge—Provision for—Other mode of discharge not excluded.

From the mere fact that there is an agreement that the debt may be discharged in a particular manner, it cannot be inferred that the creditor has waived all his other remedies.

In the case of Nattukottai Chetti family trading firms, the entire family property may legitimately be considered as the assets of the firm, no distinction being made in practice between the two.

Having regard to the practice of Nattukottai Chetties not to sign letters in their own name but to use the name of the family deity instead, placing their own

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* A. 141 of 1911. 4th August 1914.

1. (1909) I. L. R. 33 M. 89.

Chidambaram Chetti v. Ramaswami Chettiar.

name at the top of the letter, the name of the deity may be regarded as the signature of the writer for the purpose of S. 19 of the Limitation Act.

An acknowledgment by a member of a family firm who is also the managing member of the family will bind the firm.

Appeal from the decree of the Temporary Subordinate Judge of Ramnad at Madura in O. S. No. 168 of 1910.

S. Srinivasa Aiyangar for Appellants.

T. Rangachariar V. Narasimha Aiyangar and *M. Narayanasami Aiyar* for Respondents.

The Court delivered the following

Judgment:—The suit was brought by the plaintiffs the members of S. R. M. A. R. firm against the defendants members of the M. P. M. R. firm for the recovery of Rs. 24,036-0-6 due to the plaintiffs on account of dealings between them. Both of them are money lenders. The Subordinate Judge has passed a decre. in favour of the plaintiff. Against this decree the defendants 1, 3 & 4 appeal. The first objection taken is that on the facts set out in the plaint the suit is not maintainable. There is an allegation in the plaint that any amount payable by the defendants should be made good out of the money deposited by R. M, R. M. firm with the plaintiffs through and to the order of one Chokkalingam Chetti who was a member both of the defendants' firm and that of said R. M. R. M. firm. As to this it is sufficient to say that no discharge is either allowed by the plaintiffs or by the defendants. An agreement that the debt due may be discharged in a certain manner does not shew that the plaintiffs waived any other remedy which they might have. The plaintiff's case is that he has not been able to realize the debt in accordance with the agreement. On the other hand Chokkalinga Chetty himself has fraudulently taken steps to deprive him of that money. The defendants do not allege that the plaintiff has been guilty of any bad faith and it is found in Original Suit 157 which was heard about the same time that no such agreement had been proved. We therefore disallow this contention.

It is then argued that the plaintiff has failed to prove the debt. The plaintift's account books show that the debt claimed is due. The second witness swears that the entries in the account books A to C are true entries of the transactions that really took place. They open with a debit entry of 45,154-7-3 against the defendants. It is argued that there is no evidence that this amount is really

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due as the accounts which give the details as to how this sum was made up have not been filed. But the same witness proves that it was the 6th defendant one of the managing partners of the defendant's firm who directed him to debit this amount as due by the defendant's firm.

We hold therefore that the plaintiff's accounts are corroborated and their claim is proved. It is next argued that defendants 2 to 5 are not partners and that the decree that has been passed in favor of the plaintiff to recover the sum due from the second defendant personally along with others and from the family properties of the defendants is wrong because it is only their share in the assets of the firm of M. P. M. R. that should have been made liable. Though no doubt the witnesses do not state in so many terms that the sons of the 1st defendant are partners their evidence is clear that the firm M. P. M. R. was a money lending business carried on by the 1st defendant's family of which the defendants 3, 4, and 5 are members and another family represented by the 6th to 8th defendants. It was not alleged by the plaintiffs in the lower Court that it was only a certain portion of the property belonging to the 1st defendant's family that was set apart for this business.

There is no issue raising that question and looking to the usual course of practice in such cases we have no doubt that in the case of these Nattukottai Chetties their family properties should be treated as trade assets. They are a trading community and they usually treat the family property as assets making no distinction between their family property and their trade assests. In the absence of any evidence to the contrary we accept the finding of the Subordinate Judge which is also supported by the evidence of the witnesses.

The next contention is that the suit is barred by limitation. It is argued that the Exhibits E and E2 which acknowledge the defendant's liability are not proved or signed by the 1st defendant and it is also argued that the 1st defendant is not a person authorised by the others to acknowledge the liability of the firm. The letter purports to be written by Chidambaram (1st defendant) and it ends with the words "முருகன் துணை" (Murugan Thunai).

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The genuineness of these letters was not denied in the written statement though it is not expressly admitted. The plaintiff's 2nd witness swears that they are the 1st defendant's letters. The 1st defendant did not go into the witness box to deny them. We accordingly accept them as genuine. It is in evidence that the Nattukottai Chetties in writing their private letters do not usually sign their names but only write words similar to those given above which are words invoking the help of a deity. The particular deity whose name is given indicates the family as it is the family God that is always invoked. At the top of the letter the writer's own name is given. In these circumstances we accept the evidence that these words at the end of the latter are intended for the signature of the writer. We therefore hold that these letters are signed by the 1st defendant.

Whether these letters by the 1st defendant as a partner will bind the other partners is a question which is unnecessary to determine in this case; because he is the managing member of the family to which the appellants belong and his acknowledgment is therefore binding on them.

For these reasons we dismiss the appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Ayling.

K. P. Ramakrishna Patter ... *Appellant** *(1st Deft).*

v.

K. P. Narayana Patter and another ... *Respondents (Plaintiffs and 2nd Defts).*

Ramakrishna Patter v. Narayana Patter.

Specific Relief Act, S. 42—Right to property or legal character—Right to continue payment of subscription to Kuri—Not within.

A suit for a declaration that the plaintiff (a subscriber) is entitled to continue payment of subscription to the Kuri conducted by the defendant as he is not a defaulter does not lie under S. 42 of the Specific Relief Act. It is not a suit relating to a right to property or legal character as is contemplated by that section.

Second appeal from the decree of the Court of the Subordinate Judge of Palghat in A. S. No. 721 of 1912, preferred against the decree of the Court of the District Munsif of Palghat in O.S. No. 360 of 1911.

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*S.A. No. 699 of 1913. 28th October, 1914.

Ramakrishna Patter v. Narayana Patter.

C. V. Anantakrishna Aiyar for Appellant.

A. Narayana Sarma for 1st Respondent.

K. P. Govinda Menon for *K. R. Subramania Sastri* for 2nd Respondent.

The Court delivered the following

Judgment:—The first defendant is the appellant. He is the Karaiswan (or proprietor) of a Kuri which he started in August 1906. There were 11 tickets in the Kuri and the 1st defendant induced other persons to enter into contracts with himself on certain terms which included the payment of subscriptions by them to the Kuri at the rate of Rs. 250 yearly for each ticket holder. The first defendant allowed also each ticket holder to assign his rights under each contract to third persons subject to certain conditions.

The plaintiff became the assignee of half of a ticket from the 2nd defendant who had entered into one of the several contracts with the 1st defendant. The sixth subscription to the Chit had to be paid on the 17th August 1911. The plaintiff had to send Rs. 125 to the 1st defendant as subscription towards the chit due on that date. He sent the Rs. 125 but the 1st defendant refused to receive it. Hence the plaintiff brought the suit on the 31st August 1911 for two reliefs namely, (*a*) that the 1st defendant be compelled "to receive the amount due by the plaintiff for the 6th drawing after declaring that the plaintiff has right to pay subscription for the said Kuri" (*b*) "that the 1st defendant do give to the plaintiff the due receipt of the Kuri for the 6th drawing."

The District Munsif disbelieved the 1st defendant's story that the Rs. 125 was not tendered before noon on the 17th August 1911, and believed the plaintiff's evidence that the money was tendered in proper time, but following *Kristayya* v. *Kasipathi* [1] he refused to give a decree compelling the 1st defendant to accept the Rs. 125. He, however, gave the plaintiff, a decree declaring that the plaintiff is entitled to continue payment of subscriptions to the Kuri conducted by the 1st defendant as the plaintiff was not a defaulter. His decree was confirmed by the learned Subordinate Judge.

1. (1885) I. L. R. 9 M. 55.

Ramakrishna Patter v. Narayana Patter.

The contentions argued on behalf of the 1st defendant in second appeal are found in the grounds 2 and 4 of the memorandum of second appeal. Those two grounds are as below :—

"(2). The plaint does not disclose any cause of action" and

"(4) The suit for a mere declaration is not maintainable according to the S. 42 of the Specific Relief Act, the plaintiff having the right to claim consequential relief."

Though in the 4th ground, it is contended that S. 42 of the Specific Relief Act, bars the suit because the plaintiff had the right to claim consequential relief, the argument at the hearing was somewhat different. The contention was that only a person entitled to any "legal character" or to "any right to property can institute a suit for a declaratory relief in respect of his title to such legal character or right to property and that the plaintiff's suit to declare that he has contractual rights as against the 1st defendant does not come within the class of suits to declare a right to a legal character or a right to property. We think that the contention must be upheld to this extent, namely that S. 42 of the Specific Relief Act does not contemplate a suit like the present. We take it that a man's "legal character" is the same thing as a man's status. "A man's status or 'legal character' is constituted by the attributes which the law attaches to him in his individual and personal capacity, the distinctive mark or dress, as it were with which the law clothes him apart from the attributes which may be said to belong to normal humanity in general." "According to Holland, the chief varieties of status among natural persons may be referred to the following causes:— (1) sex, (2) minority (3) 'patria potestas' and 'manus' (4) coverture (5) celibacy (6) mental defect (7) bodily defect (8) rank, caste and official position (9) slavery (10) profession (11) civil death (12) illegitimacy (13) heresy (14) foreign nationality and (15) hostile nationality." (See Banerjee's Lectures on Specific Relief). We think that a declaration that a valid personal contract still subsists between the plaintiff and the 1st defendant is not a right to declare a title to a legal character or a title to right to property.

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S. 42 of the Specific Relief Act is no doubt, not intended to be exhaustive as regards the circumstances under which declaratory suits can be maintained. In *Robert Fischer* v. *The Secretary of State for India*[1] the judgment of their Lordships of the Privy Council contains the following sentences in p. 282 "Now in the first place it is at least open to doubt whether the present suit is within the purview of S. 42 of the Specific Relief Act...It is, in substance, a suit to have the true construction of a statute declared and to have an act done in construction of the statute rightly understood, pronounced void and of no effect." *"That is not the sort of declaratory decree which the framers of the Act had in their mind."* This seems to show that declaratory decrees can be passed though they may not come under S. 42 of the Specific Relief Act. In *Kistayya* v. *Kasipati*[2] the learned Judges say (at p. 57) "it is suggested that a suit may be brought to obtain a declaration that the right has not been forfeited by default and that it continues to subsist" (the right in question in that case was the right to pay a debt by instalments). "But the suit before us is not one of that kind and it is not necessary for us to express an opinion on the question, *whether under certain circumstances a declaratory suit may not be brought.*" This only shows that the learned judges were not prepared to say without hesitation that such a suit would not lie in exceptional cases. But we have not been referred to any case in which any of the High Courts in India has given a declaratory relief in respect of rights arising out of a contract which would effect only the pecuniary relationship between the parties to the contract and we do not think there are exceptional circumstances in this case to take it out of the ordinary rule.

In the result we reverse the decrees of the Lower Courts and dismiss the suit in its entirety. Under the circumstances the parties will bear their respective costs throughout.

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1. (1898) I. L. R. 22 M. 270. 2. (1885) I. L. R. 9 M. 55.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sankaran Nair and Mr. Justice Spencer.

Kallepalle Venkatarama Raju ... *Appellant* * (*Plaintiff*)

v.

Kallepalle Bapamma, and another ... *Respondents* (*Defendants*)

Venkatrama Raju *v.* Bapamma — Spencer J.

Hindu Law—Adoption—Widow—Consent of Sapindas, object of—Benefit of the family, sole consideration—Grounds personal to sapinda—Withholding of on ground of loss of right to property—Improper—Adoption with consent of remoter Sapindas, valid.

The object of getting the consent of Sapindas to an adoption by the widow being to get an independent judgment on the expediency of the proposed adoption he is not entitled to act upon grounds personal to himself but must act with a deliberate consideration as to what is for the benefit of the family.

Held accordingly that an adoption with the consent of the more remote reversioners would not be invalid when the nearest reversioner refuses to consent on the ground that he would in the event of adoption, lose his right to the property as he should be considered to have withheld his consent on improper grounds.

Appeal from the decree of the Court of the Temporary Subordinate Judge of Kistna at Masulipatam in O. S. No. 12 of 1910.

T. Prakasam for Appellant.

V. Ramdoss for Respondent.

The Court delivered the following.

Judgments—*Spencer J*: —This is a suit to set aside an adoption. Two questions arise for decision (1) whether the alleged adoption of the 2nd defendant is true; and (2) whether the refusal of the plaintiff to give his consent to the adoption invalidated any adoption made by the 1st defendant as the widow of the deceased Lakshmipati Raju.

Although the adoptive mother, the 1st defendant, has in this suit, taken the part of the plaintiff and denied the *factum* of the adoption. I have no doubt that the Subordinate Judge was correct in the finding that the 2nd defendant was adopted. All the documents produced in the case from 1906 onwards describe him as an adopted son. Exhibit III is a promissory note executed by the 1st defendant as guardian of her adopted son,

* A. S. 61 of 1912, 26th October, 1914.

Venkatrama Raju v. Bapamma.

Spencer, J.

the 2nd defendant, which purports to have been attested by the plaintiff. D. W. 5 proved the fact that the plaintiff attested this promissory note executed in his (witness's) favour. The plaintiff, in the witness-box, professed himself unable to say whether the signature in Exhibit III was his or not. The 1st defendant made several statements before the public authorities acknowledging that she had adopted 2nd defendant, and when her attention was drawn to these statements in her examination she flatly denied having made the statements. It is unnecessary to refer to the oral evidence, as, in our opinion, there is overwhelming proof that the adoption is true.

On the second point, the plaintiff is the divided brother of the late Lakshmipatiraju, and as such, is the nearest reversioner entitled to succeed to his properties after his death. He states that he was not asked by the first defendant to give his consent to the adoption of a boy. On the evidence of P. W. 5 and D. W. 4, I must take it that this denial is not true. D. W. 4 states that the plaintiff was asked to give his son in adoption and that he refused, as the son was his only son. P. W. 5 states that the reason for the paintiff's refusing his consent was that he said that he would forfeit the right to property which he would otherwise get. The Subordinate Judge treats this as a refusal based on "an evil intention to usurp the property after the death of the 1st defendant." Without using such language to characterise the refusal, we may see whether the refusal was based on improper grounds.

In *Venkatakrishnamma* v. *Annapurnamma* [1], it was held that, if a sapinda refused to consent, but withheld his grounds for such refusal, the refusal would not affect the adoption; and also if the assent was withheld from improper considerations, such dissent would be of no avail to the party relying on it. In *Ganesa Ratnamaiyar* v. *Gopala Ratnamaiyar*[2], the Privy Council held that the consent of a sapinda given on the ground that by consenting he gained some material profit from the adoption was improper. On the same principle, it would appear that a refusal on similar grounds might equally be condemned as an improper refusal. In *Parasara Bhattar* v. *Rangaraja Bhattar* [3],

1. (1899) I. L. R. 23 M. 486. 2. (1880) I. L. R. 2 M. 270 (P. C.)
3. (1880) I. L. R. 2 M. 202 at 207.

Venkatrama Raju v. Bapamma.

Spencer, J.

the test applied was whether the refusal was "from interested or improper motives or without a fair exercise of discretion." The object of getting the consent of sapindas to adoption is declared in *Venkamma* v. *Subramaniam* [1], as being to get an independant judgment on the expediency of the proposed adoption. This being so, there can be no doubt that a sapinda who is called upon to exercise his discretion ought to be guided not by reasons personal to himself, but ought to act with a deliberate consideration of what is for the benefit of the family, especially part of it which the widow represents. Applying such principles to the facts of this case, it is immaterial that the plaintiff did not give his consent to the adoption.

Other sapindas executed a document, Exhibit X, which fully authorized the 1st defendant to adopt the 2nd defendant. Only Chinna Bapi Raju was not a party to this document; his brother Peda Bapiraju signed it; and there are indications that these two brothers were undivided at the time, the elder, Peda Bapiraju, being the natural father of the boy.

I am of opinion that the Subordianate Judge rightly found that the adoption set up by the 2nd defendant was valid. The appeal is dismissed with costs.

Sankaran Nair J :— I agree.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :— Mr. Justice Ayling and Mr. Justice Hannay.

Baijnath Lala ... *Appellant** *(Plaintiff)*

v.

Ramdoss ... *Respondent* *(Defendant)*.

Baijnath Lala v. Ramd

Limitation Act (Act V. of 1908) S. 14, art. 62, 120—Suit for refund of assets—C. P. C., S. 73—"To the use of the plaintiff"—Intention of receiver not test—Time taken in revision—After order and before revision—Not to be excluded—Good faith prosecution in.

The article applicable to a suit under S. 73, C. P. C. for refund of assets is art. 62 and not art. 120.

Vishnu Bhikaji v. *Phadke* (2) followed.

The intention of the defendant at the time of the receipt of assets is not the test by which the question whether the money is received to the plaintiff's use within the meaning of art. 62 is to be determined.

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* S. A. No. 2026 of 1912. 21st October 1914.

1. (1907) I. L. R. 30 M. 50 (P. C.) 2. (1890) I. L. R. 15 B. 438.

Mahomed Wahib v. *Mahomed Ameer* (1) approved.

Ramasami Chetty v. *Harikrishnama Chetty* (2) dissented from.

Time taken in unsuccessfully prosecuting a revision petition against the order cannot be excluded as such prosecution cannot be said to be in good faith having regard to the practice of the High Court not to interfere in revision when a remedy by way of suit is open.

The time between the date of the order and the date of the presentation of the petition cannot in any event be excluded. In this matter appeals and revisions do not stand on the same footing.

Raj Krishto Roy v. *Beer Chunder Joobraj* (3) distinguished.

Second appeal from the decree of the District Court of North Arcot in A. S. No. 255 of 1911 preferred against the decree of the Court of the District Munsif of Tirupati in O. S. No. 402 of 1910.

C. V. Ananthakrishna Aiyar for Appellant.

L. A. Govinda Raghava Aiyar for Respondent.

The Court delivered the following

Judgment:—The questions for determination in this second appeal are (1) whether the Lower Courts are right in holding that article 62 and not article 120 of the Schedule to the Limitation Act applies to the facts of this case, (2) whether even if article 62 applies the suit is still in time by virtue of a deduction to which the plaintiff claims to be entitled with reference to S. 14 of the Limitation Act and (3) whether the Lower Court should have allowed the plaint to be amended so as to enable plaintiff to raise the second point.

The plaintiff, who is the appellant before us, brought the suit from which this second appeal arises under S. 73 of the Code of Civil Procedure, his application for rateable distribution as against the defendant in respect of certain assets in Court deposited by a third party against whom both plaintiff and defendant had obtained decrees having been refused by the District Court of North Arcot on 18th October 1905. The defendant drew the money in question on 19th October 1905. The plaintiff filed a Revision Petition in the High Court to set aside the order of the District Court on 21st December 1905. That petition was dismissed on 12th December 1906. The present suit was filed on 11th December 1909. If article 120 applies to the case the suit is in time in any view but if article 62 is to be applied it will be barred unless the plaintiff can shew

1. (1905) I. L. R. 32 C. 527. 2. (1911) 21 M. L. J. 705.
3. (1866) 6 W. R. 308.

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he is entitled to deduct the excess period by virtue of S. 14 of the Limitation Act.

Now, article 120 can only be applied when there is no other article of the Limitation Act applicable. In support of the view that article 62 is the proper one to apply, the cases of *Vishnu Bhikaji Phadki* v. *Achut Jagannath Ghate* [1], *Shankar Sarup* v. *Mejomal* [2], *Mahomed Wahib* v. *Mahomed Ameer*[3] and *Shanmuga Pillai* v. *Minor Govindasami* [4], have been relied on both here and in lower Court. The first case is direct authority on the point. The suit in that case was brought under S. 295 of the Code of 1882 which corresponds to S. 73 of the present Code and it was held that such a suit falls under article 62, the case of *Moses* v. *Macferlan* [5] being referred to evidently as authority for the position that the suit was one for money received for the plaintiff's use. The decision in *Vishnu Bhikaji* v. *Achut Jagannath Ghate*[1] is referred to with approval by the Privy Council in *Sankara Sarup* v. *Mejomal* [2] upon the question whether a suit under S. 295 is a suit to set aside the order of the Court passed under that section and it was held that it was not such a suit and that therefore article 13 of the Limitation Act would not apply. It was only upon that point that the case was referred to and the decision of that point was sufficient for the purposes of the case. Their Lordships expressed no opinion as to whether the proper article to apply was article 62 or article 120 and the case (though so far as it goes it supports the lower Court's view) cannot be regarded as direct authority upon that point.

The cases of *Mahomed Wahib* v. *Mahomed Ameer* [3] *and* *Shanmoogam Pillai* v. *Minor Govindasami* [4] were not cases of suits under S. 73 of the Code. But the true nature of the class of suits described in ariticle 62 of the Limitation Act is considered in the former decision and Sir Subramania Aiyar J. in the latter case expresses his agreement with the views laid down by the learned Judges of the Calcutta High Court. The conclusion arrived at in the Calcutta case was that the description of the suits mentioned

1. (1890) I. L. R. 15 B. 438.
2. (1901) I. L. R. 23 A. 313.
3. (1905) I. L. R. 32 C. 527.
4. (1907) I. L. R. 30 M. 459.
5. (1760) 97. E. R. 676

in article 62 as suits for money received by the defendant for the plaintiff's use pointed to the well-known English action in that form and that consequently the article ought to apply whenever the defendant has received money which in justice and equity belongs to the plaintiff in circumstances which in law render the receipt of it by the defendant a receipt for the use of the plaintiff. This view has been followed by the Allahabad High Court in *Bhagwan Dass* v. *Karam Hussain* [1] and by this Court in *Sankunni Menon* v. *Govinda Menon* [2]. We agree with the opinion of Mr. Justice Mukherjee in the Calcutta case that the intention of the defendant at the time of receipt of the money to receive it for himself and not for the plaintiff is not the test by which the question whether the money was in fact received for the plaintiff's use has to be decided. As observed by the Privy Council in *Sankar Sarup* v. *Mejomal* [3] "the scheme of S. 295 is rather to enable the Judge as matter of administration to distribute the price according to what seem at the time to be the rights of parties without this distribution importing a conclusive adjudication on those rights, which may be subsequently readjusted by a suit such as the present." If on such a re-adjustment being made the plaintiff in a suit under S. 73 is found to be entitled to a portion of the assets which have been paid to the defendants, we are of opinion that the latter must be regarded as having received the portion so paid to him "for the use of the plaintiff." In this connection we may refer to the extract from Blackstone's Commentaries cited by Mr. Justice Harrington in *Mahomed Wahib* v. *Mahomed Ameer* [4]. "This species of action lies when one has had and received money belonging to another without any valuable consideration given on the Receiver's part; for the law construes this to be money had and received for the use of the owner only." We think these words fitly apply to the facts of the present case.

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The appellant relies upon the cases of *Gurudas* v. *Ram Narain Sahu* [5] and *Ramasami Chetty* v. *Harikristnama Chetti* [6]. As regards the former, it has been pointed out both in *Mahomed Waheb* v. *Mahomed Ameer* [4] and *Bhagwan Das* v. *Karam Husain* [1], that the money received by

1. (1911) I.L.R. 33 A. 708 726.
2. (1912) 22 M. L. J. 485.
3. (1901) I. L. R. 23 A. 313 at 322.
4. (1911) I.L.R. 32 C. 527.
5. (1884) I.L.R. 10 C. 860 (P. C.).
6. (1905) 21 M.L.J. 705.

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the defendant in that case did not belong to the plaintiff but a third party and that the plaintiff had a mere equitable claim to follow that money in the hands of the defendant. It was in these circumstances that article 62 was held inapplicable by the Privy Council. It is plain that the facts of that case were quite different from the present, therefore in the second case *Ramasami Chetti* v. *Harikistnama Chetti*[1] the plaintiff claimed as assignee of a decree but at the time when the amount claimed by him was realized by the defendant, the plaintiff's suit to establish his rights as assignee had been dismissed. The Court in these circumstances held that as at the time when the defendant realized the money, the plaintiff could not himself have collected the amount by reason of the dismissal of his suit to establish his title as assignee, the defendant could not be said to have received the money for his use in any sense. With all respect we are unable to follow that decision. The plaintiff in this case was eventually found entitled to share in the assets realised by the defendant and that being so, we do not see why the mere fact that the plaintiff's suit to establish his rights as assignee had been dismissed at the time when the money was realized by the defendant should suffice to take the case out of the purview of article 62.

In the result therefore we think the lower court was right in holding that article 62 should be applied to the facts of the present case. The second point depends upon the question whether the plaintiff would be entitled by virtue of S. 14 of the limitation Act to deduct the time between the order of the District Court disallowing his petition for rateable distribution and the disposal of his Revision petition by the High Court (*i. e.*, from 19th October 1905 till 12th December 1906) or only the time from the presentation of the Revision Petition until its disposal (*i. e.*, from 21st December 1905 till 12th December 1906). The plaintiff relies upon the decision in *Raj Krishto Roy* v. *Beerchunder Joobraj* [2], in support of the first alternative. We think that case is not in point here. It was a case where the plaintiff's suit was dismissed for want of jurisdiction and the plaintiff then tried unsuccessfully to remedy his failure by appeal. In these circumstances it was held that as the law allows a fixed time for appeal in order to

1. (1911) 21 M.L.J. 705. 2. (1866) 6 W. R 308.

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allow the unsuccessful party to consider whether he will appeal or no, if a party appeals within the time so fixed, he ought to be considered as proceeding with due diligence between the decision of the suit and the filing of the appeal. Here, there was no question of appeal. Though the plaintiff had a right of suit under S. 73 of the Code, he elected to proceed by Revision in the High Court and the law does not fix any period within which petitions for revision are required to be brought. In these circumstances it seems to us that the case cited is not in point and that it cannot be said that the plaintiff was prosecuting a proceeding at all while he was merely making up his mind to apply for revision. In this view the time which expired between the order of the District Court and the filing of the Revision Petition in the High Court (*viz.*, from 19th October 1905 till 21st December 1905) cannot be excluded, as the plaintiff contends, under S. 14 of the Limitation Act. It is conceded that if this period be not excluded, the suit is still out of time. We think, further, that the Respondent is entitled to rely upon the contention that in any event the plaintiff cannot be said to have prosecuted the Revision Petition in good faith within the meaning of S. 14 of the Limitation Act inasmuch as it has been frequently held by this and other High Courts that the High Court will not exercise its revisional powers when there is any other remedy open. Here the plaintiff had his remedy by suit.

It is unnecessary in these circumstances to consider the third point raised regarding the amendment of the plaint.

The second appeal is dismissed with costs.

[Ordinary Original Civil Jurisdiction].

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Sir Charles Arnold White, Kt. Chief Justice, and Mr. Justice Tyabji.

Hindustan Assurance and Mutual Benefit Society Ltd. v. Rail Mulraj

The Hindustan Assurance and Mutual Benefit Society Ltd. ... *Plaintiffs* *

v.

Rail Mulraj and others ... *Defendants*.

Civil Procedure Code, Ss. 22, 23, 151—No application where suit instituted in High Court—Stay of suit—Grounds of—Abuse of process of court—Test.

* Order in C. S. No. 377 of 1913 on the Original Side of the High Court. 28th April 1914.

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Ss. 22 and 23 Civil Procedure Code do not apply when the suit sought to be transferred is one instituted on the original side of the High Court but the court has inherent jurisdiction to stay the suit on the ground that the process of the court is being abused if it finds that the suit is instituted not *bona fide* for the purpose of obtaining justice but for the purpose of harassing or annoying the defendant or obtaining something to which the plaintiff is not legitimately entitled or the expense or difficulties of the trial in the place where the suit is instituted are so great that it would be practically impossible for the applicant to get justice. *Egbert* v. *Short* (1) *Norton* v. *Norton* (2) *Logan* v. *Bank of England* (3) referred to.

Where, however, the cause of action arose wholly within the jurisdiction of the original side of the High Court (the suit being in respect of an alleged libel published in Madras).

Held that the mere fact that both the plaintiff and the defendants were residents of Punjab was not a ground for staying the suit.

The facts of the case are these :—

The plaintiffs instituted a suit against the defendants for having published certain defamatory articles against them in a newspaper called Arya Palika published in Lahore on the 22nd March 1913, 17th May 1913 and 5th July 1913 and claimed compensation for damages caused to them so far as this Presidency is concerned to the extent of Rs. 50,000. A Judge's summons was taken out by the defendants in which they asked for an order that all further proceedings in the suit in this Court should be stayed and for a direction that the plaintiffs should file their suit in a proper Court in the Punjab. The matter came on before Mr. Justice Sankaran Nair in Chambers while sitting in the Original Side on the 7th April 1914 when he passed the following

Order.—" Upon hearing Mr. T. S. Rajagopala Aiyar, Vakil for the defendants and Mr. C. P. Ramasami Iyer, Vakil for the plaintiffs and upon reading the Judge's summons filed on the 1st day of April 1914 applying for a stay of all further proceedings in the suit and for an order directing the plaintiffs to file this suit in a proper Court in the Province of the Punjab as they may be advised and the affidavit of Bihari Lal solemnly affirmed and filed on the 1st day of April 1914 and the plaint and the 1st defendant's written statement filed herein. It is ordered as follows :—

That the question involved in this application whether the hearing of a suit may be indefinitely stayed under Ss. 22, 23 and 24 and 151 of Act V of 1908 and whether this is a fit case in

1. (1907) 2 Ch. 205. 2. (1908) 1 Ch. 471. 3. (1906) 1 K. B. 141.

which the hearing should be stayed, and the same is hereby referred to a Division Court under Rule 177 of the Rules of the High Court, 1902 and that the plaintiffs do, on or before the 21st day of April 1914 file in Court their counter-affidavit. The case was accordingly posted before Sir Charles Arnold White, Chief Justice and Mr. Justice Tyabji.

C. P. Ramaswami Aiyar for Plaintiff.

T. S. Rajagopala Aiyar for Defendants.

The Court made the following

Order :—*Tyabji, J*:—This application has been referred to us by Mr. Justice Sankaran Nair sitting in Chambers on the Original Side of the High Court under R. 177 of O. XV of the Rules of the High Court of Madras. We are therefore sitting as the High Court in its Original Civil Jurisdiction and not in the exercise of the appellate Jurisdiction in appeal from decisions in the exercise of its Original Jurisdiction.

The application is that all further proceedings in this suit which has been instituted on the Original Side of this High Court be "indefinitely stayed under Ss. 22, 23, 24 and 151 of Act V of 1908". The suit is instituted by a limited liability Company for recovering damages for defamation from the editor, printer and publisher of a newspaper in Lahore.

S. 22 of the Civil Procedure Code refers to cases where a suit may be instituted in any one of two or more courts, and is instituted in one of such courts. In such cases an application may be made by any defendant for transfer of the suit to another Court. S. 22 does not provide to which Court the application for transfer has to be made. That matter is provided for in S. 23. The sub-section of S. 23 which is suggested as being applicable is sub-section 3. That sub-section however refers to the case where the several Courts having Jurisdiction are subordinate to different High Courts. One of the difficulties in the way of applying this sub-section to the present case is that the two Courts which the applicant suggests have jurisdiction, *viz.*, (1) the Original Side of the Madras High Court, (2) the Chief Court of the Punjab, cannot be said to be "subordinate to different High Courts". The section defining which Courts are subordinate to the High Court is S. 3 of the Civil Procedure Code. S. 3 refers to District Courts but not to the High Court

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in the exercise of its Original Civil Jurisdiction. S. 2 (4) defines a "district" so as to include the local limits of the Ordinary Original Civil Jurisdiction of a High Court; but it does not refer to the High Court in the exercise of its Ordinary Original Jurisdiction as a District Court. The collocation of words in S. 3 does not suggest that it was intended that the expression "District Court" should be applicable to the High Court, and S. 3 (15) of the General Clauses Act prevents the High Court in the exercise of its Ordinary Original Civil Jurisdiction being included in the expression "District Judge" and clause (24) of the same section defines a High Court in terms which do not throw any light on the question I am considering.

It seems to me, therefore, very doubtful whether the provisions of Ss. 22 and 23 can be said in their terms to apply to the present case. Subject to this doubt I agree with the learned Chief Justice in his remarks on these two sections and his examination of the Indian authorities on this point.

The application is, however, supported before us mainly on the ground that we have under S. 151 of the Civil Procedure Code inherent power to prevent abuse of the process of the Court. The existence of the jurisdiction cannot be denied. The circumstances in which the Courts will in the exercise of this jurisdiction stay proceedings on the ground that the process of the Court is being abused are referred to and explained in *Norton* v. *Norton* [1], *Egbert* v. *Short* [2] and *Logan* v. *Bank of England* [3].

These decisions refer to cases where the cause of action had arisen outside England and where the English Courts were sought to be given jurisdiction on the ground that the defendant was, at the time when the writ was issued, residing within the jurisdiction of the English Courts. In the case now before us the learned pleader for the applicants asked us to decide the case on the basis that it must be assumed for the purposes of this application that the whole of the cause of action had arisen in Madras. Where the jurisdiction is sought to be snatched from a Court by means of the accidental circumstances that the defendant happens temporarily to be within the jurisdiction of a

1. (1908), 1 Ch. 471, 481. 2. (1907) 2 Ch. 205, 210.
3. (1906) 1 K. B. 141.

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Court other than that in the local limits of which Court he ordinarily resides, the case bears a very different aspect from such a case as the present. For the libel upon which this action is based expressly refers to the local agents of the limited liability Company which is alleged to have been libelled and " the attention of the local Government of Madras is most respectfully invited to the letters" by the Editor of the Newspaper. The facts, therefore that have to be determined in deciding this suit have direct reference to the conduct of the local agents of the Madras branch of the Company. In these circumstances the plaintiffs may well claim that inasmuch as the question on which they seek adjudication has reference to people residing in Madras and the acts that will be subject of investigation have taken place in Madras it would be more beneficial to the plaintiffs that the suit should be tried by the Court in Madras. It cannot be said that in these circumstances the facts before us have any analogy to such facts as were before the English Courts in the decisions cited to us. There it was clearly pointed out that the plaintiff was seeking to put the defendant in the position referred to by Vaughan Williams L. J. in *Norton* v. *Norton* [1]. He says "I have come to the conclusion not only that this is a case in which it is more natural and more convenient to try the question in dispute in India, because the settlement was made in India and refers entirely to property in India, but, further that Mrs. Norton has brought the action in England, not for the purpose of any legitimate advantage which she might gain by so doing but for the purpose of putting her husband in such a position that he would be practically compelled to settle the action. In the present case owing to the facts to which I have referred it seems to me to be clear that at least on the materials now before us it is impossible to say that the plaintiffs have brought the suit in Madras not for the purpose of any legitimate advantage which they might gain by so doing, but for the purpose of putting the defendants in such a position that they will be practically compelled to settle the action. Conceding for the purposes of the application that the defendants may have some difficulty in proving their cases that they may find it necessary

1. (1908) 1 Ch. 471, 481.

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to examine their witnesses on commission it is the plaintiffs who have the choice of the forum and it does not follow that because the defendants may find it more difficult to make their defence in one forum than in another, the plaintiffs should be restricted in their choice. That difficulty may be a matter which the Judge trying the action may take into consideration when the defence is before him. It does not prevent the plaintiffs from bringing a suit in the Court which they may find more convenient unless for some such reasons as have been referred to in the decisions of the English Courts.

I therefore agree that the application must be dismissed with costs.

The Chief Justice:—This matter came before the learned Judge sitting in chambers in the Original Side of this Court and under R. 177 of the Original Side rules he has referred it to us. A suit has been instituted in this Court for damages for an alleged libel in a newspaper. A Judge's summons has been taken out by the defendants in which they ask for an order that all further proceedings in the suit in this Court should be stayed and for a direction that the plaintiffs should file their suit in a proper Court in the Punjab. It has not been seriously argued that it would be within our powers to direct the plaintiffs to file the suit in a proper court in another province. The contention has been that the case is one in which we ought to make an order staying all further proceedings in the suit in this High Court.

The plaintiffs are a limited liability Company with their registered office at Gujranwala near Lahore. The paper in which the alleged libel was published is printed and published at Lahore. It is not denied that there has been publication of the alleged libel in Madras. The question as to whether the cause of action for this suit arose wholly within the local limits of the Jurisdiction of the Madras High Court has not been argued by the learned vakil for the defendants; but for the purposes of this application he is prepared to assume that it did. Assuming that the matter is libellous, publication within the jurisdiction being admitted, I think there can be no question that *the* cause of action or *a* cause of action with reference to this alleged libel arose within the jurisdiction. We have been asked to make an

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order staying the suit on two grounds. First under express provisions of the Code, and secondly, in exercise of the inherent jurisdiction which is now recognised in S. 151 of the Code. The express provisions are Ss. 22 and 23 of the Code. S. 22 provides as follows, "Where a suit may be instituted in any one of two or more courts and is instituted in any one of such Courts, any defendant may .... apply to have the suit transferred to another Court, and the court to which such application......is made......shall determine in which of the several Courts having jurisdiction the suit shall proceed". (I assume this suit could have been instituted in a Punjab Subordinate Court or in the Madras High Court though damages are only claimed in respect of the publication in Madras). The first sub-section of S. 23 clearly does not apply. Then the section goes on to say: "Where such Courts are subordinate to different appellate Courts but to the same High Court, the application shall be made to the said High Court". The case does not fall within sub-section (2). Sub-section (3) says: "Where such Courts are subordinate to different High Courts, the application shall be made to the High Court within the local limits of whose jurisdiction the Court in which the suit is brought is situate." The Court in which this suit has been instituted is not a court subordinate to a High Court. Therefore S. 23 does not apply. It was argued that S. 22 gives the jurisdiction and S. 23 could not cut it down. It seems to me, however, that the two sections should be read together and if we find that S. 23 contains no provision as to the Court to which the application should be made, it may reasonably be held that S. 22 has no application to the particular facts of this case. Moreover Ss. 23 and 24 deal with the power of the Court to transfer, not with the power of the Court to stay. Certain authorities have been cited. The first case was *Tularam* v. *Harjiwan Das* [1]. That was a case in which the application was made under S. 24 of the old Code and the suit which was asked to be stayed was not instituted in a High Court, but in a Court subordinate to the High Court and the learned Judges while intimating that they had jurisdiction declined to exercise it. *Geffert* v. *Ruckchand Mohla* [2], is a decision of Mr. Justice Scott sitting alone. In some respects it is not

1. (1882) I. L. R. 5 A. 60. (1888) 1. I. L. R. 13 B. 178.

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unlike this case. There the plaintiff brought a suit in the High Court of Bombay claiming damages for libel. He had previously brought a suit in the Court of the Deputy Commissioner of Central Provinces in which he had asked for damages for wrongful dismissal. An application was made by the defendant in the suit in the Bombay High Court asking for an order staying the proceedings in the Bombay High Court. The learned Judge no doubt assumed that he would have had jurisdiction to make the order asked for. The question of jurisdiction, however, does not seem to have been argued and on the merits he declined to make any order. With reference to this suit before him he makes the observation that the plaintiff "desires to vindicate his character in the place where he alleges it has been defamed" and he adds "I can find no authority for preventing him doing so." Our attention has also been drawn to a decision of the Oudh Judicial Commissioner's Court in *Rabban Bibi* v. *Sohadra Bibi* [1]. There again the facts were similar to those in *Tularam* v. *Harjiwan Das* [2]. The application was for the transfer of a suit pending in a Subordinate Court within the Jurisdiction of the Oudh Judicial Commissioner's Court and it was asked that the suit should be transferred to a subordinate court within the jurisdiction of the Allahabad High Court. The learned judges on the merits made an order that the Subordinate Court subject to the jurisdiction of the Allahabad High Court, was the proper Court, having regard to the real interests of the parties and the general convenience of the witnesses, in which the suit should proceed. The facts in the Oudh Case are clearly distinguishable. As regards our inherent jurisdiction I have no hesitation in holding that apart from the express provisions of the Code there is an inherent jurisdiction in the High Court to stay any suit which is an abuse of the process of this Court. The Jurisdiction in my opinion existed prior to the Code of 1908 and it is recognised in S. 151. Then the question is, in the circumstances is this suit an abuse of the process of this Court? I do not propose to read the whole affidavit on which the defendants rely, but in so far as the affidavit consists of allegations of fact and not expressions of opinion, I am prepared to accept all the allegations in the affidavit.

1. (1913) 20 I. C. 758 5. (1882) I.L.R. A. 60.

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Do those allegations establish that the bringing of the suit here is an abuse of the process of this Court? We start with this that we are assuming for the purposes of this application—and the assumption seems to me to be well founded in law—that the cause of action arose wholly within the jurisdiction of this Court. The alleged libel is set out in the plaint. It contains this passage " The attention of the Local Governments of Bengal, Madras, the Central Provinces and the Punjab is most respectfully invited to the letters of our correspondents." These letters the plaintiffs say form part of the libel. That the articles were published in Madras is undisputed. The plaintiffs ask for damages so far as this Presidency is concerned. I do not think it necessary to discuss what may be the legal effect of limiting their claim to damages accruing in this Presidency. But we do find that in the plaint they expressly limit their claim. The learned Vakil for the defendants has not been able to call our attention to any Indian case in which this inherent jurisdiction has been exercised. The principle, however, is well recognised and has been given effect to in several English decisions. I would only refer to two cases, both of which curiously enough were Indian cases. In both cases disputes had airsen between husband and wife and in both cases the question was whether an action should proceed in England or in India.

The first case is *Norton* v. *Norton* [1]. That was a suit in which the plaintiff claimed an account under a settlement. The settlement had been made in India. The wife had gone to England and she alleged that she intended to reside in England permanently. The husband and *one of the trustees of the settlement* were served with a writ during their temporary presence in England and the husband and the other defendant applied to stay the proceedings in England. The application was in the Court of first instance refused but on appeal an order was made staying the proceedings in England. Vaughan Williams L. J. in delivering the Judgment of the Court of Appeal says at p. 479. "In my opinion it must be proved to the satisfaction of the Court that either the expense or the difficulties of trial in this country are so great that injustice will be done—in this sense, that it will

1. (1908) 1 Ch. 471.

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be very difficult, or practically impossible, for the litigant who is applying for the stay to get justice in this country." It is scarcely necessary to observe that the facts of the present case do not come anywhere near the test suggested by Vaughan Williams L. J. The other case is the case of *Egbert* v. *Short* [1]. There a deed of separation had been executed in India between the plaintiff and her husband. The defendant was the trustee under the deed. There was default in paying the allowance under the deed and the defendant happened to be in England on a holiday and he was served with a writ. He applied to have the proceedings stayed and they were stayed. The learned Judge in his order in staying the proceedings observes at p. 214: On the whole the conclusion at which I have arrived is that this action is brought in the tribunal in which it has been brought not *bona fide* for the purpose of obtaining justice, but for the purpose of harassing and annoying the defendants, and of obtaining something to which the plaintiff may not injustice be entitled." It cannot be suggested in this case that if the plaintiff proves in this Court that he has been defamed, if he proves that the defamatory matter has been published within the local limits of the jurisdiction of this Court, and that he has suffered damage within the local limits of the jurisdiction of this Court by reason of the publication it cannot be suggested that the suit is brought within the local limits of the jurisdiction of this Court "for the purpose," to use the words of the learned Judge in *Egbert* v. *Short*[1] "of obtaining something to which he may not in justice be entitled". It seems to me that the defendants have failed to make out that the institution of the suit in this Court is an abuse of the process of this Court.

I would dismiss the application with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

The Chartered Bank of India, Australia and China, through its agent T. A. R. T. Arunachalam Chetty ... *(Appellant)* Counter-Petitioner (Decree-holder)*

v.

K. P. Velliappa Chetty and others ... *Respondents (Claim-Petitioner)*

Hindu Law—Nattukottai Chetties—Trade assets—Family property—No difference between.

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*C.M.A. 7 of 1914. 26th October 1914.

1. (1907) 2 Ch. 205.

Arunachalam Chetty v. Velliappa Chetty

In the case of Nattukottai Chetties, there is no difference between trade assets and family property *Chidambaram Chetty* v. *Ramasami Chetty* (1) followed.

Appeal from the order of the Court of the Subordinate Judge of Ramnad at Madura in E. A. 892 of 1913 in E. P. No. 95 of 1913 (in C.S. 154 of 1911 in the file of the Chief Court of Lower Burma.

K. Srinivasa Aiyangar and *A. Krishnaswami Aiyar* for Appellant.

N. Ramachendra Aiyar for Respondent.

The Court delivered the following

Judgment:—The Subordinate Judge's order cannot be supported. Rule 50 of the Order XXI of the Code of Civil Procedure relied on by the Subordinate Judge has no application as no property of the minor defendants not involved in the family trade was sought to be attached or sold.

As regards the contention (accepted by the learned Subordinate Judge) that the family property in Pullateen must be proved to be the assets of the Rangoon Firm which is not different from the family firm known as K. P. Firm, it being only a branch of the K. P. Firm), we follow the rulings in *Chidambaram Chetty* v. *Ramasami Chetty* [1] and that "in the case of Nattukottai Chetties, their family property should be treated as trade assets" and that no distinction should be made between the family property and the trade assets.

The Subordinate Judge's order is set aside and the Petition No. 892 of 1913 in Execution Application No. 95 of 1913 will stand dismissed with costs in this and in the Lower Court, the attachment order being revived.

The execution proceedings are transferred to the file of the Temporary Subordinate Judge of Sivaganga.

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1. (1914) 27 M. L. J. 631.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Sankaran Nair & Mr. Justice Spencer.

Umade Rajah Raji Damara Kumara Chinna Venkatappa Nayanim Bahadur Varu ... *Appellant* * (*Plaintiff*)

v.

Umade Rajah Raji Damara Kumara Thimma Nayanim Bahadur Varu and others ... *Respondents* (*Defendants.*)

Rajah Venkatappa Nayanim Varu *v.* Rajah Thimma Nayanim Varu

Hindu Law—Impartible zamindari—Maintenance—Agreement for—Liability to variation—Binding only against zamindar executing—Suit for partition—Compromise—Registration Act, S. 17—Subsequent agreement—Maintenance allowance to a person and his lineal descendants—Illegality of—Rule against creation of interests in favour of unborn persons.

A suit by the 1st defendant for the partition of the Kalahasti Zemindari against his brother who was the then zamindar to which all the other brothers were parties, ended in a compromise by which the zamindari was declared impartible and it was further agreed that the zamindar's brothers (including the present plaintiffs and the 1st defendant) and their male descendants should get a certain maintenance allowance from the income of the estate. The clause as to maintenance however was not embodied in the decree as it was held not to relate to the subject-matter of the suit. But subsequently in 1896, the same maintenance was secured to them by the successor of that zamindar though the terms varied as to the time of payment and the source from which the maintenance was payable. It was made payable out of the estate as well as its income. In a suit for the recovery of the allowance by the plaintiffs from the 1st defendant who had since become the zamindar it was contended that the financial condition of the zamindari did not admit of the same payment and the contention was upheld. *Held*: on appeal,

That the plaintiffs could not fall back on the compromise as its terms varied from the agreements and the rate provided for by the agreements was liable to variation owing to changed conditions.

Held, Per Spencer J.—That the appellants could not rely on the terms of the compromise in so far as they affected immoveable property as the agreement was not registered *Chelamanna* v. *Rama Rao* (1), followed.

A maintenance allowance does not lose its character of being liable to be increased or decreased by the mere fact that it is embodied in a decree or agreement.

An agreement providing for the payment of a permanent allowance to a person and his lineal descendants out of a zamindari is void as contravening the rule of Hindu Law against the creation of interests in favour of unborn persons.

Per Sankaran Nair J.—In the absence of proof that the agreements were executed under circumstances binding on the succeeding zamindars, they bound only the zamindar that executed them and maintenance not being such a charge as to preclude the zamindar for the time being from alienating portions of the zamindari for necessary purposes, the rate fixed by the agreement was liable variation owing to changed conditions.

Appeals against the decrees of the Court of the Temporary Subordinate Judge of North Arcot in O. S. Nos. 17 and 9 of 1910 respectively.

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* A S Nos. 216 & 217 of 1911. 6th October 1914.

1. (1911) I.L.R. 36 M. 46.

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The plaintiff, a brother of the present *Zamindar* of Kalahasti, (the first defendant in the case) sued for the recovery of maintenance allowance both past and future on foot of a registered agreement, exhibit A in the case, whereby a predecessor of the defendant in the *Zamindari* agreed for himself and his successors in the estate to pay to the plaintiff and to his male descendants, Rs. 650 per mensem on the liability of the Kalahasti *Zamindari*. The agreement had been entered into under the following circumstances:—

One Akkappa was the *Zamindar* before the 1st defendant and Muthuvenkattappa the eldest brother of the 1st defendant was the *Zamindar* before Akkappa. In 1890 when Muthuvenkattappa was the *Zamindar* the present 1st defendant brought a suit (O. S. 12 of 1890) for partition of the Kalahasti estate making all his brothers parties thereto.

The suit was compromised on the footing that the estate was to be declared impartible and that the brothers were to be paid an allowance of Rs. 700 a year out of the income of the estate for themselves and their male heirs for ever. The District Court passed a decree in terms of the compromise but the High Court on appeal held that the decree should not incorporate the agreement regarding the maintenance allowances in favour of the brothers, on the ground that it did not relate to the subject-matter of the suit. (See I.L.R. 18 M. 410). Meanwhile Muthuvenkattappa had died and Akkappa became the *Zamindar*; and the present plaintiff and defendants 1 and 5 who were some of the brothers, got registered deeds executed to them in respect of their maintenance allowances providing for payment of Rs. 650 a month for themselves and their male heirs for ever out of the income of the estate. The allowance was not however paid at this rate either in Akkappa's lifetime or subsequently after 1st defendant succeeded to the estate in 1905. During the years when the estate was under the Court of Wards, and for several years thereafter Rs. 400 per mensem only was being paid and received under protest. The plaintiff now sued to enforce the payment of the allowance to him and his male heirs at the rate of Rs. 650 a month as originally agreed to and for recovery of arrears due at this rate. The Subordinate Judge decreed maintenance only at the rate of Rs. 400 a month and made it a charge on the estate.

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In dealing with the question as to the proper rate of maintenance the Subordinate Judge of North Arcot observed as follows :—

" The contesting defendants now contend that the condition of the Kalahasti Estate as it was at the date of the agreement, Exhibit A, does not permit of anything more than Rs. 400, a month being paid to the plaintiffs, much less its present condition; while for the plaintiffs, it is argued that the condition of the estate at the time of the agreement amply afforded the payment of Rs. 650, a month to the plaintiffs and that the subsequent increase of the indebtedness of the Estate is no ground for reduction of the amount, the deterioration of the income being one due to the Zamindar's default of proper and prudent management and not to natural causes. In support of his latter contention, the plaintiff's vakil relies on *Maharajah Grees Chand Ray* v. *Sumboo Chand Ray* [1], *Vijaya* v. *Sripathi* [2], *Gopika Bai* v. *Dattatraya* [3], and these cases fully support it. The cases relied on by the defendant's vakils to the contrary *Rukabai* v. *Gandabai* [4], *Sidlingapa* v. *Silavakem Sidlingapa* [5] do not I think, in any way contradict the principle laid down in the above cases. The only question therefore for consideration is whether in the condition of the estate in 1896, when the plaint contract was made or in 1893, when the compromise in O. S. 12 of 1890 was made, the plaint rate of Rs. 650, a month was a proper rate to be allowed."

He then referred to the income and expenses of the estate which left a net income of only about Rs. 70,000, per annum, and continued. "There are now four branches of junior members of the family and two widows of the late Rajahs Muthu Venkatappa and Akkappa who are entitled to allowances out of the estate, besides the Zamindar himself and having regard to the above circumstances and to the fact that their Lordships of the High Court allowed only Rs. 250, a month to a brother of the Zamindar who had income of 40,000, a year (vide *Kachi Kaliyana Rengappa Kalappa Thola Udayar* v. *Kachi Yuva Rengappa Kalakka Thola Udayar* [6]) and to a brother's son at Rs. 250 a year when the income was Rs. 30,000 a year

1. (1865) 5 W. R. 98 (P. C.).
2. (1884) I. L. R. 8 M. 94.
3. (1900) I. L. R. 24 B. 386.
4. (1878) I. L. R. 1 A. 594 at 596.
5. (1878) I. L. R. 2 B. 624 at p. 630.
6. (1905) I. L. R. 28 M 505 (P.C).

and only one junior branch *Venkatachella Reddiar* v. *Venkatachella Reddiar* [1]) I think the rate of Rs. 650 agreed upon in this case in 1896 was far too excessive then, and that nothing more than Rs. 400 a month is proper and reasonable."

On the question of the right of the present Zamindar to plead that the rate under the original agreement was not binding upon him the Subordinate Judge observed in paragraph 11 of his Judgment as follows :—

"The present Zamindar was not a direct party to the contract with the 1st plaintiff whether under the original compromise in O. S. 12 of 1890 or under the subsequent registered agreement of 1896, and his right to dispute the contract on the ground of the excessiveness of the amount has not been questioned. Even if it be questioned I would disallow the objection. Though it is not open to him to question the payments already made under the above contract, he is entitled to dispute its validity as against him when more is claimed under it from the estate which he represents, not as the heir of the persons who made the contract with the 1st plaintiff but in his own right as the senior of the surviving members of the family."

The plaintiff preferred this appeal.

S. Srinivasa Aiyangar for the Appellants.

L. A. Govinda Raghava Aiyar, *S. Varadachariar*, *P. Venkatramana Rao*, *T. V. Muthukrishna Aiyar* and *G. Venkatramiah* for Respondents.

S. Sreenivasa Aiyangar for the appellants contended.

1. that the rate of Rs. 650, was not merely an ordinary maintenance allowance but was agreed on as part of the compromise arrangement under which the junior members gave up their right to claim partition as also their right to certain villages and other allowances given to them by their father's will and that the contract was therefore not liable to be revised like an ordinary maintenance arrangement

2. that even if it was liable to variation the reduction can take effect only after the court had passed the decree reducing the rate of maintenance

3. that the rate of Rs. 650 per mensem was a fair rate in the circumstances. Reference was made to the following

1. (1909) 20 M. L. J. 894.

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authorities. *Venkatappa Nayanim* v. *Thimma Nayanim* [1], *Sri Raja Rau Venkata Kumara Mahipati Surya Rau* v. *Sri Raja Rau Chellayammi Garu* [2], *Bhup Singh* v. *Lachman Kunwar* [3], *Maharani Dambar Koeri* v. *Rai Sham Kissen Das* [4], *Sreeram Bhuttacharjee* v. *Puddo Mokhee Debia* [5], *Asad Ali Mollah* v. *Haidar Ali* [6], *Tara Sundara Debi* v. *Sarodacharan Banerji* [7], *Vaidyanatha Sastrial* v. *Eggia Venkatarama Dikshiter* [8].

Govindaraghava Aiyar for the respondents contended that the first question was not raised in the lower Court, that the evidence on record showed, that the arrangement of 1896 on which the suit is based cannot be identified with the compromise of the earlier suit, that the later arrangement was in form and substance only a maintenance arrangement and that the right of the succeeding Zamindar to show the excessiveness of the rate was recognised by *Maharaja Grees Chund Roy* v. *Sumbhoo Chund Roy* [9]. The fact of the maintenance being fixed by a document did not exclude the right of revision (See *Subramaniam Pattar* v. *Vembammal*[10]). That viewed as a mere contract entered into by the Zamindar for himself and his successors for ever in favour of the brother and his male descendants for ever, the arrangement was invalid and opposed to the Hindu Law. See *Chandi Churn Bama* v. *Siddeshwari*[11], that the creation of a charge in default of proper payment did not amount to the present transfer of a heritable interest in property ; that even, so regarded an estate in favour of a person and his male descendants is invalid under the Tagore case and the recent *Darbhanga* case [12], where at page 1257 the Privy Council say that such an estate can be validated only by a special custom.

G. Venkatramiah.—For one of the respondents argued that his client who had obtained a compromise decree for maintenance before the date of the suit agreement had a prior charge and that the unregistered compromise of 1894 did not and cannot create a charge. Reference was made to *Natesa Chetti* v. *Vengu Nachiar*[13] *and Chelamanna* v. *Rama Rau*[14].

1. (1894) I. L. R. 18 M. 410.
2. (1893) I. L. R. 17 M 150.
3. (1904) I. L. R. 26 A. 321.
4. (1905) 9 C. W. N. 703.
5. (1868) 9 W. R. 152.
6. (1910) I. L. R. 38 C. 13.
7. (1910) 12 C. L. J. 146.
8. (1907) I. L. R. 30 M. 279.
9. (1835) 5 W. R. 98 (P. C.)
10. (1904) 14 M. L. J. 339.
11. (1888) I. L. R. 16 C. 71 (P. C.)
12. (1914) 18 C. W. N. 1257.
13. (1909) I. L. R. 33. M. 102.
14. (1911) I. L. R 36 M. 46.

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S. Srinivasa Aiyangar—in reply, contended that in the circumstances the compromise of 1894 did not require registration. As to the validity of the arrangement to pay Rs. 650 per mensem perpetually, he contended that this was in the nature of an annuity or rent charge and amounted to the transfer of a present interest in property descendible to the grantee's heirs and not a contract or grant successively for the lives of each heir, that *Chandi Charan Bama* v. *Siddeswari* [1], would not affect such an arrangement, that perpetual annuities were not unkown to the Hindu Law which recognised them as Nibandha or corrody, that the reference to the male descendants was only by way of imperfect description of a heritable estate and the Tagore case did not apply. Reference was made to the inclusion of hereditary allowances in the definition of immoveable property in the Registration Act, to Colebrooke's Digest Vol. II; 162 Encyclopædia of the Laws of England, Vol. I, 356, Halsbury Vol. 24, pages, 465, 469, 472 and 486 William's Personal Property, pp. 285 and 312 and to the following cases. *Chalamanna* v. *Subbamma* [2], *Ramnad Zemindar* v. *Doraisami* [3], *Muthurama Chettiar* v. *Sundara Kumara Ettappa Sami* [4], *Kanhia Lal* v. *Muhammad Hussain Khan* [5], *Aziz Unnissa* v. *Tassadduq Hussain Khan* [6], *Karim Nensy* v. *Heinrichs* [7], *Muhammad Hossain Khan* v. *Mahomed Nehaluddin Khan* [8], *Salamat Hossain* v. *Luckhi Ram* [9], *Hemchunder Chowdhury* v. *Akul Chunder Chakrabarti*[10], *Ashutosh Dutt* v. *Doorgachurn Chutterjee*[11].

The Court delivered the following

Judgments.—*Spencer J*:—The first defendant in these suits is the present Zamindar of Kalahasti, an impartible estate. The 1st plaintiff in O. S. No. 9 of 1910 and the sole plaintiff in O. S. No. 17 of 1910 are brothers of the 1st defendant. The 2nd plaintiff in O. S. No. 9 of 1910, is the minor adopted son of the 1st plaintiff. They brought these suits for a declaration of their rights to maintenance at the rate of Rs. 650

1. (1888) I. L. R. 16 C 71.
2. (1888) I. L. R. 7 M. 23.
3. (1884) I. L. R. 7 M. 341.
4. (1899) 9 M. L. J. 113.
5. (1882) I. L. R. 5 A 11.
6. (1901) I.L.R. 23 A 324 (P.C.)
7. (1901) I. L. R. 25 B 563.
8. (1888) C. L. R. 330.
9. (1884) I. L. R. 10 C. 521.
10. (1913) 19 C. L. J. 118.
11. (1879) I. L. R. 6 I. A. 182.

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per mensem and for recovery of the same with arrears and interest as a charge upon the estate. They also claimed priority over the mortgage rights of certain mortgagees who were made parties to the suit and thus raised questions which need not now be considered as they are not pressed in these appeals. The 1st defendant acknowledged that the plaintiffs were entitled to be maintained out of the estate but pleaded that the financial condition of the estate was such that he could not afford to give his brothers more than Rs. 400 per mensem which was in fact the amount that they were receiving during the period when the estate was under the management of the Court of Wards. The lower Court gave the plaintiffs a decree for Rs. 400 per mensem during their joint and several lives for the maintenance of their branches of the family and directed that the sums due on account of past and future maintenance at this rate should be recoverable as a charge upon the estate. From this, plaintiffs' appeal on the ground that the amount awarded should not have been less than Rs. 650.

The position taken for the appellants is this. The present 1st defendant brought a suit O. S. No. 12 of 1890 for partition against the then Zamindar Muthu Venkatappa to which all the brothers were made parties. It ended in a compromise in which the estate was declared to be impartible and the succession to it was declared to be governed by rules of primogeniture, simultaneously it was agreed that the Zemindar's brothers, including the present plaintiffs and the 1st defendant and their male descendants should be entitled to a maintenance allowance from the income of the estate of Rs. 600 per mensem for the first ten years and of Rs. 700 per mensem thereafter. The District Court passed a decree in terms of the compromise but on appeal the High Court held in *Venkatappa Nayanim* v. *Thimma Nayanim*[1] that the stipulations which were outside the scope of the suit should not have been embodied in the decree and these included the stipulations as to allowances, so they were excluded.

After the death of Muthu Venkatappa, Akkappa succeeded to the Zemindari, and during his time two of the brothers of Muthu Venkatappa *viz.*, the present 4th defendant and the father of the

1. (1894) I. L. R. 18 M. 410.

6th defendant brought suits against Akkappa in respect of their maintenance allowances and obtained consent decrees for Rs. 650 per mensem. The other brothers, *viz.*, the 1st plaintiff in O. S. No. 9 of 1910 and the plaintiff in O. S. No. 17 of 1910 and the present *Zamindar* got registered agreements executed (Exhibits A. C. and I) with Akkappa in similar terms of Rs. 650 per mensem. On the death of Akkappa the 1st defendant became *Zamindar*.

Now it is urged that the appellants have by virtue of exhibits A and C become creditors of the Estate and not mere maintenance holders, that the agreements are binding on all the successors of the *Zemindar* who executed them and that therefore no less sum than what was agreed upon therein can now be given as maintenance. Further it is argued that the compromise having been entered into as a settlement of certain claims to portions of the estate is binding on all who took part in it and their representatives, and creates vested rights in favour of those whose rights are declared in it.

Lastly it is contended on the evidence that the amount claimed was not excessive and that the estate could well afford it.

On the last point I agree with the Subordinate Judge's opinion that nothing more than Rs. 400 is proper and reasonable for the reasons given in paragraph 10 of his judgment.

As for the other points now taken in the appeals it is noticeable that Exhibit A, though purporting to have been executed in pursuance of the razinamah in O. S. No. 12 of 1890, contains terms very different from the compromise petition (Exhibit D). Not only is the amount of maintenance different in the two documents as I have already stated, but the periodical instalments in which payments are to be made are different, and Exhibit D states the source to be the income of the *Zamindari* whereas Exhibits A. and C. provide for recovery of the allowance from the estate as well as its incomes. Exhibits A. and C. are three years later than Exhibit D.

It is thus impossible to treat Exhibits A. and C. as having the same force and binding character as a decree in a suit terminating litigation and compromising a *bona fide* claim to property. Nor can the appellants rely on those terms of the compromise (Exhibit D) which have not passed into a decree or

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order of Court so far as they affect the immoveable property comprised in the document, as the agreement of compromise was not registered. (Vide *Chelamanna* v. *Rama Rao* [1]). Exhibits A. and C. are registered and purport to be agreements relating to the payment of maintenance allowances, as is distinctly stated in the first clause of the document.

An amount provided as maintenance for a member of a family does not lose its character as a maintenance allowance by being embodied in an instrument or decree, the character, I mean of being liable to be increased or decreased under a change of circumstances, (Vide *Gopikabai* v. *Dattatraya* [2], *Subramaniam Pattar* v. *Vembammal* [3], and *Maharajah Greeschand Roy* v. *Sambhoochand Roy* [4]. For these reasons alone I consider that the Subordinate Judge had power to direct the 1st defendant to pay maintenance at a lower rate than Rs. 650. But as reliance is placed on the binding character of the registered documents under which it is claimed that plaintiffs and their male heirs have acquired a right to an hereditary annuity for all time, I may observe that in so far as Exhibit A. and C. provide that Seshachalapati and Venkatappa and their male descendants have a vested right to recover the fixed allowances through the present *Zamindar* and after him through the rightful owners of the *Zamindari* or their heirs, assignees, executors, administrators, trustees, etc.; from the estate and its incomes by declaring a recurring charge on the Kalahasti estate, these documents create a future interest in immoveable property in favour of persons unborn, and thus impose a restraint upon alienation which is contrary to the principles of Hindu Law. In excluding females and collaterals they provide for a line of succession not according to law, and they are therefore invalid' (*Vide* Mukhopadhyaya's Law of Perpetuities in British India, pp. 123 to 128 and the Privy Council decision in *Chandi Churn Bama* v. *Sidhesswari Debi* [5].

I would therefore dismiss these appeals with costs.

The 3rd Respondent in Appeal 216 who got a consent decree in O. S. No. 33 of 1895 (Exhibit E) on 22nd April 1896 for maintenance allowance of Rs. 650 per mensem has filed a

1. (1911) I. L. R. 36 M. 46.
2. (1900) I. L. R. 24 B. 386.
3. (1904) 14 M. L. J. 339.
4. (1835) W. R. 598 (P. C.)
5. (1888) I. L. R. 16 C. 71.

memorandum of objections claiming priority over the appellant's right on the ground of his decree being prior in point of time to Exhibit C which is dated 17th November 1896.

In these suits it is unnecessary to determine questions of priority between the various maintenance holders *inter se* seeing that their right to receive maintenance rests in the first instance not on their decrees or agreements but on their relationship to the owner of the *Zamindari*.

The objection memorandum in App. 216 of 1911 is for this reason dismissed with costs. That in Appeal 217 is out of time and is also dismissed with costs.

Sankaran Nair J:—I agree.

I think that considering the income of the *Zamindari* Rs 400 is a fair rate of maintenance.

The terms of the compromise in O. S. No 12 of 1890 relating to maintenance were not embodied in the decree. It is not those terms that are now sought to be enforced. The subsequent registered agreement of 1896 is so far as the rate is concerned only binding on the *Zamindar* who executed it. It is not shown that it was executed under circumstances which would make it binding on the succeeding *Zamindars* who take the property in their own right.

It was not contended, nor could it be successfully contended, that the maintenance formed such a charge on the *Zamindari* as would preclude the *Zamindar* for the time being from alienating portions of it for necessary purposes. It would be unreasonable to hold in the circumstances that the maintenance is a fixed unvarying amount.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Hannay.

Sivapada Mudali and others ... *Appellants** *(Defendants Nos. 1, 4 and 5)*

v.

Pitty Thyagaraja Chettiar and another ... *Respondents (Plaintiffs and 3rd Defendant.)*

Sivapada Mudali v. Thyagaraja Chettiar.

Madras Estates Land Act, S. 6—Landlord purchasing the tenant's interest—Tenant in possession, notwithstanding at the time of the passing of Act—Effect of

*S. A. 1693 of 1913. 16th November 1914.

Sivapada Mudali v. Thyagaraja Chettiar.

—Rights of claimants to kudivaram inter se not affected by S. 6—Landlord precluded from acquiring tenant's interest,

Where at the date of the coming into force of the Estates Land Act, the defendant a ryot was in possession of the property though his interest had been purchased by the plaintiff the landlord for arrears of rent,

Held, that S. 6 of the Estates Land Act conferred occupancy right on the defendant and the plaintiff could not evict him.

Markappali Reddiar v. *Thandava Kone* (1), followed.

The rights to the Kudivaram interest as between rival claimants thereto (other than the landlord who is debarred from claiming such interest) are not affected by S. 6, cl. 1.

Second appeal from the decree of the District Court of Chingleput in A. S. No. 71 of 1912, preferred against the decree of the Court of the District Munsif of Tiruvellore in O. S. No. 649 of 1906.

K. N. Aiyah for Appellants.

K. Srinivasa Aiyangar and *G. S. Ramachandra Aiyar* for Respondents.

The Court delivered the following

Judgment:—The defendants are the appellants. They were the tenants of the plaintiff who is the Zamindar of the Egathoor Zamin. The plaintiff purchased not only the Zamindari from the former Zamindar but he also purchased the kudivaram right in the plaint ryoti lands which the former Zamindar had purchased in rent auction sale of 1900. The plaintiff brought the suit out of which this second appeal has arisen as the purchaser of the kudivaram right from the rent auction purchaser for ejecting the defendants.

This suit was brought in the District Munsif's Court of Tiruvellore about the end of 1906 before the Estates Land Act came into force. The suit was first dismissed by the District Munsif and by the District Judge on appeal. The High Court on second appeal held that the decision of the lower Courts against the plaintiff on the fifth issue was wrong and set aside the decree of the lower Courts and remanded the suit for disposal on its merits. The judgment of the High Court is dated 22nd August 1911 after the Estates Land Act came into force. When the case went back to the District Munsif, the defendants raised a fresh contention, namely that the Madras Act I of 1908 has conferred on them occupancy rights in the land

1. (1914) M.W.N. 798.

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and that the suit ought to be dismissed on that ground. Thereupon two new issues were raised by the District Munsif and they are as follows:

6th issue:—"Whether the defendants are entitled to occupancy rights under Madras Act I of 1908." 7th issue:—"whether, this plea can be raised now."

The learned District Munsif decided the issues in the defendant's favour and dismissed the plaintiff's suit without costs. On appeal, the learned District Judge held on the 6th issue that S. 6 of the Estates Land Act protects only those ryots who were in possession on the date of the passing of the Act by reason of their holding over (after the expiry of the period of lease, having never had occupancy right before), that a ryot whose holding had been sold away in rent auction before the Act came into force but who continued in possession is not "a ryot in possession" within the meaning of S. 6, cl. 1, but is only a trespasser in occupation of ryoti land, and that the word "possession" means "lawful possession" and not merely holding over whilst proceedings for ejectment are in progress. Upon this view, the learned District Judge decreed the plaintiff's suit with costs.

In *Kanakayya* v. *Janardana Padhi and two others* [1], the Full Bench decided that even after a decree in ejectment had been passed against the ryot in favour of the landlord, if the decree had not become final owing to an appeal having been preferred against it and if the said appeal is pending on the date when the Madras Estates Land Act came into force, the ryot is entitled to rely on S. 6 and the suit must be decided in his favour against the landlord. In the order of reference to the Full Bench in that case the learned Judges of the Division Bench made the following remarks:—

"The contention that the possession of the defendant ceases in law by a decree for possession against him is a confounding of possession with title and is not worthy of serious notice."

The explanation to S. 6 added by S. 3 of Act IV of 1909 is as follows:—"For the purpose of this sub-section, the expression 'every ryot now in possession, shall include every person who, having held land is a ryot, continues in possession of such land at the commencement of this Act." It seems to me that the

1. (1910) I.L.R. 36 M. 439, 21 M. L. J. 31. F. B.

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defendants in this case were ryots in possession of ryoti land not being old waste, continued in possession of such land at the commencement of the Act and that therefore according to the plain wording of S. 6, cl., 1 they obtained a permanent right of occupancy in the holding of which they so continued in possession. Under S. 8, cl., 1 the landholder who has purchased the kudivaram right in a rent auction sale has no right to hold it as a ryot. Even if he had taken possession as soon as he had purchased it in 1902, the land could not cease to be ryoti land; S. 8, cl. 3 clearly says that the purchase of the occupancy right by the landholder shall not have the effect of converting ryoti land into private land (see also S. 185 of the Act which has among other provisions placed stringent restrictions on the conversion of ryoti land into private land). The land being thus ryoti land and the defendants holding the land for the purpose of agriculture (without repudiating their liability to pay rent for the benefit of such occupation though they may not have had title to occupy it till the passing of Estates Land Act as against the landholder owing to their kudivaram having been sold away), the defendants do come under the definition of "ryot" in S. 3, cl. 15 and can therefore claim the benefit of S. 6, cl. (1). In the case *Markappali Reddiar v. Thandava Kone and another* [1] Ayling and Seshagiri Aiyar JJ. held that, where the landlord bought the tenants' interest at a rent sale held in 1878, the land continued to be ryoti land under S. 8 of the Estates Land Act and that a person in possession at the time the new Act was passed, acquired, occupancy rights under S. 6 of the Act. It is contended by Mr. K. Srinivasa Aiyangar that the case might have been decided on the ground that the defendant therein had been recognised as tenant by the landholder after the landholder purchased the holding in rent auction (though the defendant was let in only as a Pannai tenant) and hence the defendant in that case was entitled to the benefit of S. 6.

But the learned Judges do not base their decision on that narrow ground but on the broader ground that a person in possession of ryoti land professing to hold it as a ryot on the date of the passing of the Act gets a permanent right of occupancy. Next it is contended that if S. 6 be so literally interpreted, it will give

1. (1914) M. W. N. 798.

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the permanent occupancy right to a person in possession, not only against the landlord but also against persons entitled to claim the Kudiwaram right as against the person in possession, for instance, a trespasser who had dispossessed the ryot lawfully in possession, say a week before the passing of the Madras Estates Land Act, would acquire a right of occupancy in the land as against the true owner of the Kudiwaram right. I think however that though the words "as against the landlord" do not appear in S. 6, cl. 1, the use of the word permanent right of occupancy" and the references to the claims of a landlord in several places in that long section clearly indicate that the rights to the Kudiwaram interest as between rival claimants thereto (other than the landlord who is debarred by S. 8 from claiming such interest) were not intended to be affected by S. 6, cl. 1. It is then said that the landholder in this case sues in ejectment not as landholder but as purchaser of the Kudivaram interest. But if S. 8, cl. 1 prevents the landholder from setting up a right to hold the land which he has purchased in rent auction, *as a ryot* that is, if it prevents him from getting rid of his status as landholder in respect of the land whose Kudivaram right he has purchased in rent auction, his said purchase cannot avail him against the ryot in possession just as it would avail in favour of a third person. I think that that is the principle of the decision in *Markappali Reddiar* v. *Thandava Kone* [1], and I am prepared to follow it.

In the result the lower Appellate Court's decree will be reversed and the District Munsif's decree will be restored. There will be no order as to costs under the circumstances of this case.

Hannay J:—I agree.

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1. (1914) M. W. N. 798.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.
APPELLATE JURISDICTION.

Present:—Sir John Edward Power Wallis Kt. Offg. Chief Justice and Mr. Justice Seshagiri Iyer.

Peruri Viswanatha Reddi ... *Appellant** *(Defendant)*

v.

D. T. Keymer ... *Respondent* *(Plaintiff).*

Visvanatha Reddi *v.* Keymer.

Civil Procedure Code, S. 13—Foreign judgment—Failure to answer interrogatories—Defence struck off—Judgment given—Not on the merits—No action lies upon—Court of competent jurisdiction—Judgment of English Court against non-resident Indian subject—Jurisdiction conferred by Imperial Statute.

Where the defendant having failed to answer interrogatories, his defence was struck off and judgment was given against him in an English Court.

Held, that the judgment was not one on the merits and action would not lie on it.

Quaere, if judgment of the English Court against a non-resident British Indian subject is not one by a court of competent jurisdiction within the meaning of S. 13 C. P. C. by reason of the fact that an Imperial statute confers jurisdiction to try actions against non-resident foreigners.

Moazzin Hossein v. *Raphael Robinson* (1) referred to.

On appeal from the judgment and decree of the Hon. Mr. Justice Bakewell, dated the 8th September 1914, in the Ordinary Original Civil Jurisdiction of the High Court and made in C. S. No. 291 of 1913.

V. V. Srinivasa Aiyangar with *V. Masilamani Pillai* for Appellant.

D. Chamier instructed by Messrs. King and *Partridge* for Respondent.

The Court delivered the following

Judgment:—This is an appeal from the decision of Bakewell, J. on the original side giving judgment for the plaintiff in a suit on a foreign judgment obtained by the plaintiff against the defendant in the High Court in England. The defendant pleaded among other things that the English Court had no jurisdiction, and that the case was not decided by the English Court on the merits. Bakewell, J. overruled both the defences and gave the plaintiff a decree on the judgment sued on.

It appears from the certified copy of the English judgment filed by the plaintiff that the defendant was

* O. S. A. No. 77 of 1914. 6th November 1914.

1. (1901) I. L. R. 28 C. 641.

ordered to answer interrogatories and failed to do so, and that therefore it was ordered that his defence should be struck out and that he should be placed in the same position as if he had not defended, and that the plaintiff should be at liberty to sign judgment against him for £ 425-17*s.* 2*d.* the amount claimed and costs and that judgment was signed accordingly.

Now in this state of things the first question that arises is whether a judgment obtained in this manner was a judgment not given on the merits of the case within the meaning of S. 13 (*b*) of the Code of Civil Procedure, in which case it is not to be conclusive upon the parties in a subsequent suit. Bakewell, J. has held that it must in the circumstances be taken to have been given on the merits, but with great respect we are unable to agree with him. We cannot see how a case, in which the defence, or to use our phraseology, the written statement of the defendant was struck out and he was not permitted to go into the merits at the trial can be said to have been decided on the merits. In *The Delta* [1], Sir Robert Phillimore overruled a plea of *res judicata* by reason of a foreign judgment on two grounds, one, that the foreign judgment had not been pronounced when the English suit was instituted and that it was therefore merely a case of *lis alibi pendens* and the second, that the foreign judgment "not having been given on the merits of the case but on matter of form only" could not be set up as a bar to a decision on the merits. A foreign judgment passed in default of appearance was there treated as not being a decree on the merits, as also Gorell Barnes, J., in *The Challenge and Duc Daumale* [2]. It does not seem to us to make any difference whether the default was to enter appearance or to answer interrogatories when the result of not answering them was to put the defendant in the same position as if he had never entered appearance. There is however even more direct authority. In *Haigh* v. *Haigh* [3], in refusing to set aside a judgment signed, as the judgment sued on was, after the defence had been struck out for failure to answer interrogatories, Parson, J. said that he had the strongest disinclination that any case should be decided otherwise than upon its merits, but that in the circumstances he could not set aside the judgment. And in *Farden* v. *Richter* [4], the Master

1. (1876) 1 P. D. 393.
2. (1904) P. 41.
3. ( ) 31 Ch. D. 478.
4. ( ) 23 Q. B. D. 124.

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and the Judge at chambers set aside a judgment obtained in this way on the default of the defendant to answer interrogatories, and the Court of Appeal restored the judgment on the ground that the affidavit of the defendant in support of the motion to set aside the judgment did not show that he had a defence on the merits. These cases which apparently were not cited before the learned judge appear to us to show that a judgment obtained in such circumstances as the present judgment cannot be considered to have been decided upon the merits.

It has next to be considered how this finding effects the present case. This is a suit on the foreign judgment and not on the original cause of action as appears both from the plaint and the issues; and it is now well settled that in such a suit the cause of action is the legal obligation to satisfy a foreign judgment which complies with the requisite conditions. This was so ruled by Phear and Bayley, JJ. in *Heera Monee Dossi* v. *Promothonath Ghose* [1], citing the judgment of Parke B. in *Williams* v. *Jones* [2], and is in accordance with all the later authorities in England. Such a foreign judgment under the terms of our law is not conclusive unless the case be decided on the merits, and a judgment that is not conclusive for this reason cannot of itself constitute a cause of action. Even before the introduction of the statutory provision in the Code of 1877 that foreign judgments not given on the merits should be no bar to a fresh suit here, it had been ruled in *Sreehuree Bhukshee* v. *Gopal Chunder Samunt* [3], citing Story's Conflict of Laws that foreign judgments must in order to be received, finally determine the points in dispute and must be adjudications on the merits. Whether or not this latter statement be in accordance with principle or with recent decisions in England it has been accepted by the legislature and embodied in the Code and we are bound to give effect to it. The provisions of the Code of 1877 expressly dealt only with foreign judgments as a bar to a suit and not as constituting a fresh cause of action. It would however be anamolous that different rules as to the recognition of foreign judgment should apply according as it is set up as a bar to a fresh suit or as a fresh cause of action; and the provision,

1. (1867) 8 W. R. 32. 2. (1845) 13 M. and W. 628.
3. (1871) 15 W. R. 500.

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which was added to S. 14 by Act VII of 1888, giving the court's power to inquire into the merits of the case in suits brought on foreign judgments of certain specified courts is a clear indication that the general provisions of S. 14 were considered applicable to suits on foreign judgments as well as to foreign judgments set up in bar to a fresh suit. This question is very fully discussed in Mr. Hukim Chand's '*Res judicata*' where the same conclusion is come to. We must therefore hold that the plaintiff is not entitled to sue on the foreign judgment in this court as it was not a decision on the merits.

In this view of the case it is unnecessary to consider whether the judgment sued on was the judgment of a court of competent jurisdiction for the purposes of S. 13 of the Code by reason of its having been passed in the exercise of jurisdiction conferred on the High Court in England pursuant to an Act of the Imperial Parliament, *Moazzim Hossein Khan* v. *Raphael Robinson* [1]. The utility of such a suit is no doubt much impaired by the decision we have come to, but this is not perhaps to be regretted, as but for the fact that the authority conferring jurisdiction on the High Court in England is the Imperial Parliament to which we are subject, no such suit would lie here for the reasons given by their Lordships of the Judicial Committee in the *Faridkote case* [2]. The precise point decided in *Moazzim Hossein Khan* v. *Raphael Robinson* [1] might come before the courts in England if a defendant resident in England were sued thereupon a judgment obtained in one of our High Courts under clause 12 of the Letters Patent which are issued under an Imperial Statute but no such case has yet arisen. In the result the appeal will be allowed and the suit dismissed with costs throughout.

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1. (1901) I. L. R. 28 C. 641. 2. (1894) I. L. R. 22 C. 222 (P. C.)

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Narayana Reddi v. Kamakshi Ammal.

Present:—Mr. Justice Oldfield and Mr. Justice Tyabji.

Narayana Reddi ... *Appellant** (*2nd Plaintiff*)

v.

Kamakshi Ammal and others ... *Respondents* (*Defendants*).

Abatement of suit—Suit for possession—Hindu Law—Will alleged to be invalid as property joint family property—Death of minor plaintiff—Effect of.

Where a minor had sued for the recovery of certain property on the ground that the property was joint family property and as such the will by his father by which he had constituted the 1st defendant trustee for the plaintiff absolutely in the event of the plaintiff attaining majority, in default for certain charity, was invalid but died soon after.

Held that the cause of action did not abate and the suit could be continued by the representatives of the plaintiff.

Second appeal from the decree of the Court of the Subordinate Judge of Trichinopoly in A. S. No. 334 of 1914, preferred against the decree of the Court of the District Munsif of Karur in O. S. No. 294 of 1910.

S. T. Srinivasagopalachariar for Appellant.

T. Rangachariar and *N. Rajagopalachariar* for Respondents.

The Court delivered the following

Judgment:—The 1st plaintiff, a minor, sued the 1st defendant by his guardian for possession of the suit property, as his by survivorship, and for a declaration that the will purporting to have been made by his deceased father, on which the 1st defendant relied, was null and void. This will vested the property in the 1st defendant in trust for the 1st plaintiff in case he should attain majority and in trust for a temple in case of his failure to do so. 1st plaintiff died a minor. 2nd plaintiff the present appellant, was placed on the record as his legal representative; subject to objection to be disposed off in the final judgment. The 2nd plaintiff then had the other defendants impleaded, as representing the temple and as having taken possession of the property on its behalf in accordance with the will on the 1st plaintiff's decease.

* S. A. 481 of 1913. 10th September 1914.

Narayana Reddi v. Kamakshi Ammal.

The Lower Appellate Court held and these defendants have argued here, that the 2nd plaintiff's cause of action is not identical with the 1st plaintiff's and that the former therefore cannot carry on the latter's suit. We cannot follow the learned Subordinate Judge in his argument based on the alleged division of the will into two portions, one of which it was, he held unnecessary for the 1st plaintiff to have declared inoperative. It is in fact doubtful whether the 1st plaintiff was under any obligation to ask for relief in respect of the will at all, since it was the foundation, not, of his claim, but of the 1st defendants' defence, and it was for the 1st defendant to propound it and establish its validity. But in any case, the 1st plaintiff sued, alleging that the property had vested in him and that he was entitled to possession of it notwithstanding the will, and the 2nd plaintiff was entitled, as his heir, to prosecute that suit. The facts that the 2nd plaintiff impleaded fresh defendants, to whom the property had been transferred and that he alleged the transfer to them as consequent on the 1st plaintiff's death are immaterial, when the former alleged that both the 1st defendant and the other defendants took the property under colour of the same title, that based on the will. We observe further that, not only was this allegation in the plaint and the foundation, on which the 1st plaintiff and after him the 2nd plaintiff were bound to base their claim, but it was not denied by the defendants subsequently impleaded, who set up no separate title or trespass on their part.

Here the Lower Appellate Court's decision is supported further on the ground that the cause of action of a minor, such as the 1st plaintiff's is personal to him, since it would be open to him to reprobate his guardian's action on attaining majority and therefore does not survive to his heir. We have been shown no authority for this contention and it does not commend itself on its merits.

The second appeal must therefore be allowed. The Lower Appellate Court's decision is set aside and it is directed to restore the appeal to its file and dispose of it according to law. The costs in this Court will be costs in the cause.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sankaran Nair.

Prati Appala Raju ... *Petitioner* (Accused).*

v.

Muthuraju Surapa Raju ... *Respondent.*

Appala Raju *v.* Surapa Raju.

Sankaran Nair J.

Estates Land Act, S. 212—Ryot in possession at the time of the passing of the Act—Decree in ejectment—Prosecution not liable to.

A ryot in possession at the time of the passing of the Estates Land Act but against whom a decree in ejectment had been passed on the ground that he had no occupancy right and his tenancy had been terminated by notice to quit is not liable to prosecution under S. 212 for being in possession without the landlord's consent.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure 1898, praying the High Court to revise the order of the Court of the Head Quarter Deputy Magistrate of Cocanada in Cr. A. No. 37 of 1913 preferred against the judgment of the Court of the Sub-Magistrate of Pithapuram in C. C. No. 106 of 1913.

B. Somayya for the Petitioner.

V. Ramesam for the Respondent.

The Court made the following

Order:—The accused was a tenant in possession of lands of which the complainant is said to be the landholder. His father was in possession before him. The landlord sued him in ejectment and a decree for possession was passed in his favour before the Estates Land Act came into force on the ground that the tenant had no occupancy right and that his right to possession had been determined by notice to quit. He is now prosecuted and convicted under S. 212 of the Estates Land Act for being in possession of the land without the landlord's consent. S. 212 of the Estates Land Act would apply only if the decree could be treated as one passed under S. 163. It could not be so treated in this case as the accused is not a person who occupies the land otherwise than by inheritance. The conviction cannot therefore be sustained. The conviction and sentence are set aside and the fine if levied will be refunded.

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* Cr. R. C. No. 774 of 1913. ... 27th February 1914.
Cr. R. P. No. 625 of 1913.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Sir John Edward Power Wallis Kt. Officiating Chief Justice and Mr. Justice Seshagiri Aiyar.

Akkaraju Narayana Rao ... *Appellant* in A. S. No. 227 of* 1910 *(Plaintiff) and Respondent in C. M. P. No.* 2078 *of* 1911.

v.

Akkaraju Seshamma and others *Respondents (Defendants) in A. S. No. 227 of* 1910.

&

Namburi Venkatakrishna Rao. ... *Petitioner in C. M. P. No.* 2078 *of* 1911.

Narayana Rao v. Venkatakrishna Rao.

Civil Procedure Code, S. 148, Order 7, r. 11—Application to appeal—Appeal out of time when proper Court fee paid—Discretion to excuse delay—Hindu Law—Self-acquisition—Burden of proof—Nucleus, existence of—To be proved.

S. 148 of the C. P. Code has not the effect of making O. 7, r. 11 applicable to memoranda of appeals so as to make it incumbent on the Court to admit them though out of time when the conditions of that rule are complied with.

Achut Ramchandra v. *Nagappa* (1) dissented from.

It is only when there is ancestral property by means of which other property may have been acquired that the burden is shifted on the party alleging self-acquisition to prove that the property was acquired without any aid from the family estate.

Ramkishan Das v. *Tundamal* (2) followed.

Appeal from the decree of the Court of the Temporary Subordinate Judge of Guntur in O. S. No. 4 of 1909 and petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to dismiss A. S. No. 227 of 1910 as being presented out of time without sufficient cause.

T. Prakasam for the Appellant.

P. Narayanamurthi and *V. Rama Doss* for the Respondents.

The Court delivered the following

Judgment :—The true question is as to whether the appeal is out of time. The appellant under Order 44 presented an application for leave to prosecute his appeal in *forma pauperis*

* A.S. No. 227 of 1910 and C.M P. No. 2078 of 1911. 4th September 1914.

1. (1913) I. L.R. 38 B. 41. 2. (1911) I. L.R. 33 A. at 677.

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accompanied by a memorandum of appeal as required by the order. The application for leave was two months out of time and was filed on the last day allowed for filing the appeal. Eight days later the court returned the application and the memorandum on the ground that the application was out of time and gave two days' time to explain the delay. Two days later the appellant again presented the memorandum of appeal with the full Court fee and applied under S. 149 that the delay should be excused. In the case of plaints insufficiently stamped O. 7, R. 11 (S. 54 of the old Code) the Court is bound to give a few days to pay the correct fee. Delay could be excused if the insufficiency was caused by a mistake as to the amount of the requisite stamps. But under S. 149 it is now left to the discretion of the Court.

In *Balkaran Rai* v. *Gobind Nath Tiwari* [1] the opinion was expressed that these provisions of S. 54 as regards a plaint were not made applicable to a memorandum of appeal by virtue of S. 582. To meet this decision a new S. 582-A was inserted which allowed the admission of insufficiently stamped memorandum of appeal presented within proper period of limitation provided the insufficiency of the stamps was caused by a mistake on the part of the appellant as to the amount of the requisite stamps. This enactment appears to us to recognise the correctness of the Allahabad ruling that S. 54 did not apply to memorandum of appeals as, if it did, there would have been no need for the new section. Then we come to the present Code which for S. 582-A substituted a new S. 149 not confined to memoranda of appeals but giving the Court a discretion in all cases to allow the payment of the fee at any time. This in our opinion is the section which governs the present case, and with respect we are not satisfied as to the correctness of the ruling in *Achuta Ramchandra* v. *Nagappa Bab Balgya* [2] that under the present Code O. 7, R. 11 is rendered applicable to memoranda of appeals by S. 148 so as to make it incumbent upon us to admit memoranda out of time where the conditions of the rule are complied with. In the present case we are not prepared to differ from the exercise of the single judge's discretion in admitting the appeal.

1. (1890) I. L. R. 12 A. 129 at 151. 2. (1913) I. L. R. 38 B. 41.

A. S. No. 227 of 1910.

Narayana Rao *v.* Venkatakrishna Rao.

Akkaraja Rama Doss had two sons, Sitaramayya and Janakiramayya. The plaintiff is the grandson of Sitaramayya. The defendant is the widow of Janakiramayya, who died in 1907. This suit is for the recovery of his property on the ground that the plaintiff and the deceased were members of an undivided Hindu family and that by survivorship the plaintiff has become entitled to it. The case for the defendant is that the properties were the self-acquisition of Janakiramayya.

The Subordinate Judge upheld the defendants' plea and dismissed the suit. Hence this appeal.

The plaintiff bases his claim on two grounds: (*a*) that Ramdoss the common ancestor of himself and Janakiramayya acquired large property with the aid of which the latter purchased the properties in suit and (*b*) that his grandfather Sitaramayya and Janakiramayya had thrown their earnings into a common stock, and that the properties sued for represent the savings and accumulations from the joint acquisition. We have heard Mr. Prakasam at considerable length and we are not satisfied that either of these allegations has been made out in this case. Ramdoss was apparently a man of methodical habits: he kept accounts and although owing to lapse of time, all of them are not available, Exhibit E which relates to the period immediately preceding his death shows that he left only Rs. 84 and odd at the time of his death. This sum has been proved to have been spent for his funeral expenses; we see no reason to disagree with the conclusion of the Subordinate Judge that it has not been established that there was any nucleus of the property of Ramdoss in the hands of Janakiramayya. It has not been shown that any Inams were in the possession of Ramdoss and that they descended to his sons. Exhibit N has not been proved. The property mentioned in Exhibit D has not been shown to be ancestral property. There is no evidence that the Inam mentioned in Exhibit C ever was in the possession of Ramdoss.

As regards the theory of joint acquisition, *prima facie* the facts that the two brothers were lending their savings in their individual names, transacted separate business and kept separate accounts are against it. There is no reliable evidence that Sitaramayya remitted his earnings to his father or brother:

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On the death of Sitaramayya the properties left by him and the debts which he had advanced were all collected by one Gopala Krishnaya on behalf of the widow. No portion of these was mixed up with the earnings of Janakiramayya. On the other hand we have full and exhaustive accounts kept by Janakiramayya (Exhibit III Series) after the death of his father in 1870 which show with what small beginnings he began life and how they were augmented month after month. The totals in Exhibit III Series approximate to the properties now claimed in the suit. These accounts prove beyond doubt that the properties in dispute were the self-acquisitions of Janakiramayya.

Mr. Prakasam laid stress on the fact that Ramdoss applied for a succession certificate to the estate of his son, Sitaramayya. There is nothing to show that the certificate was granted or that any moneys were collected by him, *non constat* that if any money if collected reached Janakiramayya and was mixed up by him with his own money. Subsequent to the death of Sitaramayya and Ramdoss, Janakiramayya brought up his brother's son and grandson, educated them and got them married. They were apparently living with their mother in Janakiramayya's house. From these facts Mr. Prakasam argues that they constituted members of a Joint family with the deceased and that the burden was upon the defendant to prove that the properties were not ancestral. We are unable to uphold this contention as the Subordinate Judge has pointed out, Janakiramayya appears to have done just as much for the descendants of his brother who have never made any claim to share in his property. Further all these relations including the plaintiff and his father appear to have been treated by Janakiramayya rather as dependants than as co-sharers. A joint family presupposes the possession of common property. Under the Hindu Law mere living together of the members of a family will not make them joint owners of properties acquired by each individual member. There must have been a nucleus of ancestral property which was utilized for the purpose of making the subsequent acquisitions or the members must have thrown their joint earnings into hotchpot with the intention of giving up their individual rights in them. Mr. Justice Chamier examines all the previous rulings

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upon the subject in *Ram Kishan Das* v. *Tunda Mal*[1] and says that "there is no presumption that property found in the possession of any one member is joint family property unless it is shown that the family as such possessed at least some property." In another place the learned Judge says that it is only when there is "ancestral property by means of which other property may have been acquired, then it is for the party alleging self-acquisition to prove that it was acquired without any aid from the family estate." We entirely agree with these propositions. In *Dhurm Das Pandey* v. *Mussamat Sham Sundri Debiah*[2]. Lord Campbell states distinctly at p. 240. "It is allowed that this was a family who lived in commensality, eating together and possessing joint property." The Judicial Committee laid down that under these circumstances the mere fact that purchases were made in the names of individual members of the family was not evidence of separate ownership. *Vedavalli* v. *Narayana*[3] proceeds on the same principle.

We have found that there was no nucleus of ancestral property proceeding from Ramadoss and that his two sons did not throw their earnings into a common stock. On these findings the decisions quoted by Mr. Prakasam have no application. We agree with the Subordinate Judge in his conclusion and dismiss the appeal with costs.

(Ordinary Original Civil Jurisdiction).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Kumarasami Sastri

Varadaraja Mudaliar and another ... ... *Plaintiffs* *

v.

Narayanasami Mudaliar and others ... ... *Defendants.*

Varadaraja Mudaliar v. Narayanasami Mudaliar.

Hindu Transfers and Bequests Act—Madras Act I of 1914—Retrospective operation of—Will—Construction—Bequest in favour of unborn persons—Validity of—Gift as Stridhanam but provision for property going to descendants—Effect of.

Madras Act I of 1914 has retrospective operation only to the extent that it applies to wills made before the passing of the Act where the dispositions are intended to come into operation at a time which is subsequent to the passing of the Act. It has no application when the testator died long before the passing of the Act and according to the law then in force the property has vested in

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* C. S. No. 179 of 1913 24th August 1914

1. (1911) I. L. R. 33 A. 677. 2. (1843) 3 M. I. A. 229.

3. (1877) I. L. R. 2 M. 19.

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Kumarasami Sastri, J.

the heirs on the footing that the dispositions are invalid as being in favour of unborn persons.

Where a will provided that the testator's children should remain together and hand over their earnings to the executors who are to support them, that the earnings so handed over and the rents collected with any surplus should be accumulated for the benefit of the grandchildren and that the property should be taken by his grandchildren on the death of his children, the grandchildren being unborn at the death of the testator. *Held* that the disposition was invalid and the property vested in the heirs of the testator as on an intestacy, but that a provision in the will that out of the income, 100 persons should be fed annually as a matter of charity, was valid.

Where property was given to a daughter as Stridhanam but it was also provided that on her death the property should go to her descendants. *Held*: the fact that the disposition in favour of the descendants is invalid, would not invalidate the disposition in favour of the daughter and that she took the property as her stridhanam.

Mahomed Ibrahim and *C. Pattabhirma Iyangar* for Plaintiffs.

V. Masilamani Pillai and *T. S. Rajagopala Aiyar* for Defendants.

The Court delivered the following

Judgment:—Plaintiffs who are the sons of one Munisami Mudaliar sue for a declaration that the bequests to the grandchildren of the said Munisami made by his will dated the 6th August 1898 are invalid, and for a portion of the properties left by him. The plaint sets out that by his will dated the 6th August 1898 the testator directed that his sons and daughters should have no interest in the estate and that the income should be accumulated for the benefit of the testator's grandchildren who were to take all the property, that defendants 2 and 5 obtained probate of the will and have been guilty of various acts of mismanagement, that the bequests to the testator's grandchildren are void as they were not in existence when the testator died and that there has been an intestacy which entitles the plaintiffs as the sons of the testator to claim the estate and a partition thereof between the various heirs of the testator.

Defendants 1 and 3 filed a written statement praying for the construction of the will of their father and the ascertainment and delivery of their share. Defendants 2 and 5 the executors with probate deny that they undervalued the estate or were guilty of any of the acts set out in the plaint and pray that the will may be construed and the rights of the parties ascertained.

Varadaraja Mudaliar v. Narayanasami Mudaliar.

Kumarasami Sastri J.

The 4th defendant filed a written statement pleading that under the terms of the will there is a valid bequest of house and ground No. 2/60 (item 3 of the plaint schedule) in her favour. That she and her husband acting in accordance with the terms of the will contributed over Rs. 3,000 to the estate and that if the bequest in her favour be held to be invalid then the sum of Rs. 3,000 be returned to her. Defendants 6 to 8 filed no written statements. Defendants 9 to 21 were directed to be made parties as they were the grandchildren of the testator and had an interest in the suit which was to construe the will. The guardian *ad litem* of defendants 9 to 15 filed a written statement setting up that the bequests were valid and that they had a share in the will. Defendants 16 to 19 by their guardian *ad litem* filed a written statement stating that their rights should be established if the Court considers the bequests valid. Defendants 20 and 21 filed a written statement in similar terms.

The following issues were settled

I. Is there an intestacy to any and what extent ?

II. To what relief are the parties entitled.

1st issue. Probate of the will of Munusami Mudali, has been filed as Exhibit, A.

Munusami Mudaliar left no grandchildren at the time of his death and the question is whether the terms of the will are valid. The will directs that his properties moveable and immoveable should be enjoyed by the children of his first and second wife in common but that they should have no right to the properties. It directs that the executors should collect the rents due, receive outstandings and pay liabilities and look after the maintenance of the family, perform the marriages of such of those children as are unmarried. The will proceeds as follows :— " Besides thus remaining as one family and conducting everything in common all these, namely, the income derivable from the aforesaid houses, the income derivable from the cart stand and the income derivable from the bazaars and the incomes which my sons may get by employment or trade should all be put together and both the aforesaid executors should look after those and on deducting the maintenance expenses of the family and Government tax and repairs, and etc. expenses should give meals to 100 persons as a matter of charity annually in the month of Purattasi. On meeting all these expenses the remaining sum should be added as

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assets to the other properties and augmented. Those that do not abide to do so and refuse to give their earnings shall have no right whatever in this. They must go out with such earnings. Those that do not consent to remain in the family and do quarrel, if by their remaining, anything bad should arise to the family, such of them should be removed from the family and if they have not any means of earning for their maintenance 4 or 3 should be given every month and those should remain and live in a room in the aforesaid house." It also provides that his second wife should continue to live in this family and conduct family affairs and that if she does not do so she should live in one room and receive a maintenance of 3 or 4 a month. The will proceeds as follows:— "No body has any right in the aforesaid properties. Even if sold, the sale, should be void. Of the aforesaid properties the house bearing door No. 6/20 should be given as Stridanam to my first wife's daughter Audi Lakshmi Ammal and Chiranjeevi Munusami Mudaliar, Chiranjeevi Ponnusami Mudaliar, sons of my sister and the members of that family should remain jointly with this, family and from the total of all the incomes should be met (the expenses in connection with) the good and bad occurring to this family". It states that after the death of the above persons house No. 6/20 should be enjoyed by their descendants. As regards the other properties the will provides as follows: — "All other properties should be enjoyed by my sons as long as they are alive and after that one-half should be enjoyed by the descendants of my first wife's sons and the other half share by the descendants of the second wife's sons." The scheme of the will seems to be that his children by his first and second wives should remain together and hand over their earnings to the executors who are directed to support them, that the earnings so handed over and the rents of the properties collected with any surplus should be accumulated for the benefit of the grandchildren and that the property should be taken by the grandchildren on the death of his sons and daughters. It is not disputed that none of the grandchildren were alive at the death of the testator and it is proved by the 1st plaintiff that the first grandchild was born 3 or 4 years after the testator's death. It is a well settled law that a bequest to persons

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who are not born at the date of the testator's death is invalid, and consequently the dispositions in the will in favour of the grandchildren of the testator are invalid. Madras Act I of 1914 which declares the rights of Hindus to make transfers and bequests in favor of unborn persons has no application as the testator died long before the Act came into force and the Act has retrospective effect only to the extent that it applies to wills made before the passing of the Act where the dispositions made are intended to come into operation at a time which is subsequent to the passing of this Act. Where the testator dies before the Act came into force the properties would vest in his heirs in the event of an intestacy according to the law then in force and S. 2 of the Act as I read it does not operate to divest such vesting. Moreover as no life estate is given to the sons it cannot be said that the gift to the grandchildren was intended to come into operation after the 14th February 1914 the date on which the Act was passed. Except the right to receive maintenance subject to certain conditions there has been no gift in favour of the sons. As the gift to children is invalid (except in the case of house No. 6/20, item 3 in the plaint to which I shall refer later on) there has been no gift in favour of the sons and daughters even for their lives, it follows that there has been intestacy so far as such properties are concerned. The directions in the will that the daughters are to be maintained out of the estate is valid and due provision will have to be made for their maintenance. Provision will have to be made for the marriage of the testator's daughters who have not yet been married. The result is that the sons and daughters take the properties as heirs under the Hindu Law, the grandchildren taking no interest except as members of an undivided family who by birth acquire a right to the grandfather's properties. As regards house No. 6/20 there is, in my opinion a gift to the testator's daughter Audi Lakshmi Ammal as the will says that house No. 6/20 should be given as Stridhanam to her. It no doubt goes to state that after her, the property should be enjoyed by her descendants, but the fact that the gift over is invalid would not defeat the estate given to her. It is unnecessary to consider in this suit whether as between her and her children she has a power of alienation or not over the properties.

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Second issue:—The result of my finding is that there is a valid direction in the will whereby 100 persons should be fed annually in the month of Purattasi out of the income of the properties except item 3 which is given to the daughter, that there is intestacy as regards the said properties and the rights of the parties are therefore to be determined under Hindu Law. The suit will be referred to the chambers for an account being taken of the estate and effects of the deceased Munusami and the excutors will file accounts of the income and expenditure and the balance in their hands within a month from this date. Objections will be filed within two weeks after filing the accounts. After making provision for the feeding of one hundred persons in Purattasi every year the properties will be divided between the sons of the testator in equal shares subject to due provision being made for the maintenance of the daughters and the marriage expenses of such daughters as are unmarried. Costs will be reserved till after the accounts are filed and will be dealt with at the time of the passing of the final decree.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Sir John Power Wallis, Kt., Offg. Chief Justice and Mr. Justice Seshagiri Aiyar.

M. Swaminatha Aiyar ... *Appellant** *(Plaintiff)*

v.

Appasami Aiyar and others ... *Respondents (Defendants Nos. 1 to 3 and 5 to 7.)*

Swaminatha Aiyar v. Appasami Aiyar.

Deed—Construction—Sale or mortgage—Agreement to reconvey—Antecedent relationship of mortgagor and mortgagee—Shortness of period within which to exercise right to have reconveyance—Value of the property.

Where in favour of a person who already held mortgages on the property up to its full value and who was about to file a suit upon them, a sale was effected with an agreement to reconvey within 18 months which though entered into on the day in which the sale was arranged was embodied in a document dated 10 days later and recited that the request for the agreement was made on the day the document was executed.

Held, having regard to all these circumstances, the transaction was a sale and not a mortgage.

Appeal from the decree of the Court of the Subordinate Judge of Kumbakonum in O. S. No. 17 of 1910.

K. V. Krishnasami Aiyar for Appellant.

T. Rangachariar, R. Kuppuswami Aiyar, E. Duraisami Aiyar and *G. S. Ramachandra Aiyar* for Respondents.

* A.S. No. 62 of 1912. 30th October 1914.

Swaminatha Aiyar v. Appasami Aiyar.

The Court delivered the following

Judgment:—This case has been argued yesterday and to-day with great ability by Mr. Krishnaswami Aiyar, but he has not persuaded us that the Subordinate Judge was wrong. The question is whether two documents one of which (Exhibit B.) is in terms of a deed of absolute sale and the other Exhibit A an agreement to reconvey executed ten days later by the vendee under the previous document constitute a mortgage by conditional sale. S. 58 of the Transfer of Property Act, Cl. (c) says that where the mortgagor ostensibly sells the mortgaged property on condition that on payment of the mortgage money the buyer shall transfer the property to the seller, the transaction is called a mortgage by conditional sale. And to see whether the ostensible sale referred to in the section when taken with the agreement for reconveyance was intended to operate as a mortgage by conditional sale, it is well settled that the surrounding circumstances have to be looked to as ruled by their Lordships of the Judicial Committee in *Situl Purshad* v. *Luchmi Purshad* [1]. That does not mean that evidence is to be admitted to contradict the terms of the documents in which the parties have embodied their intentions, namely, the deed of sale and the agreement to reconvey. That we think, was all that was intended by the decision of the Judicial Commitee in *Balakishen Das* v. *W. F. Legge* [2]. Applying these principles to the present case we have to deal with certain property including a mortgage interest which was acquired by the mortgagor between the years 1891 and 1898 for nearly Rs. 48,000. The mortgagor who was carrying on business on a large scale had executed mortgages on this property to the extent of Rs. 45,000 and he had paid no interest on the mortgages and a little over Rs. 48,000 was due on the date of the transaction, that is to say, a little more than what had been paid for the suit properties by the mortgagor. It is quite clear that the mortgagee, the defendant, was dissatisfied with this state of things and thought the time had come for him to realize his security. Accordingly he expended a sum of over Rs. 13,000 in the purchase of Court-fee stamp paper with the view of suing on his mortgage. Thereupon both parties sought the advice of the pleaders. This was on the 20th January and on that day the

1. (1883) I. L. R. 10 C. 30 (P. C.) 2. (1889) I. L. R. 22 A. 149 (P. C.)

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plaintiff, the mortgagor, undoubtedly entered into an agreement to sell the suit property to the mortgagee, the defendant; and it is alleged for the plaintiff though denied for the defendant, that on the same day the mortgagee undertook to execute an agreement to reconvey. We have come to the conclusion in the plaintiff's favour that on that date the mortgagee did sign an undertaking to execute a proper agreement for reconveyance in the mortgagee's favour. The next thing that happened was that the mortgagor executed an absolute sale deed Exhibit B, in favour of the defendant on the 25th. Some difficulty appears to have arisen at this stage and the plaintiff was not willing to register the sale deed executed by him until he got the agreement to reconvey executed by the mortgagee; and the mortgagee apparently was not very ready to execute this agreement and the matter would appear to have been referred to a vakil, Panchapakesa Sastri with certain instructions contained in Exhibit C. This document speaks of a draft (by which appears to be meant the draft of an agreement prepared in pursuance of the mortgagee's undertaking to execute an agreement to reconvey) as having been handed to this vakil. There was also given him on the same day, *i. e.*, the 27th, a letter by the brother-in-law of the mortgagee undertaking that the mortgagee would execute an agreement for reconveyance. The sale deed was then registered on the 28th and on the 5th of February the mortgagee executed an agreement to reconvey, but subsequently refused to register it and registration had to be effected compulsorily. We do not think that these difficulties which arose in carrying out the original bargain of the 20th January really make much difference. We think they show a certain reluctance to carry out the terms at first agreed upon; but we think the case must properly be dealt with, as contended for by the plaintiff, as if in fact these two documents had been agreed to be executed on the 20th.

Then what we have got to do is to look to the surrounding circumstances to see whether what was intended was a mortgage or a sale. That is a question to be decided in each case on the particular facts of the case. Here we have a strong indication that what was intended was an out and out conveyance

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in the fact that the defendant had taken steps to file a suit for the purpose of realizing his security and put an end to the relation of mortgagor and mortgagee; and we have the further fact that in Exhibit A a very short term of 18 months is fixed within which the plaintiff was to have the right to reconveyance on payment of the mortgage money. It has been held in several cases that the fact that only a short period such as this is given a very strong indication that it was not the intention to create or perpetuate the relation of mortgagor and mortgagee. The fact here rather suggested that this agreement to reconvey was merely meant as a concession made by the mortgagee to the mortgagor to induce him to save the trouble and expense of litigation. There is a further small indication, pointing the same way, and it is this; though in fact the agreement to make a reconveyance was arrived at on the 20th January, yet in the agreement Exhibit A which was executed several days afterwards a request to execute this reconveyance is said to have been made by the mortgagor "this day", which day was then ten days after the deed of absolute sale; and the deed was executed in this form without objection by the plaintiff. Another point which has also to be considered is whether the price paid was inadequate or not, because, when it is shown that the price was clearly inadequate, that raises a strong presumption that what was intended was a mortgage. In this case the price was Rs. 2,000 more than the property had cost in the course of its acquisition between 1891 and 1898. The evidence that it is now worth very much more was treated by the Subordinate Judge as unreliable, and we think that it has not been shown that this was an inadequate price; at any rate to such an extent as to afford an indication that what was intended was a mortgage rather than a sale. On the whole we think that on the facts of this case the inference is that the mortgagee was never prepared to consent to more than a mere agreement to reconvey and that the transaction only amounted to an absolute sale with an agreement to reconvey and not to a mortgage by conditional sale. The conclusion arrived at by the Subordinate Judge is, therefore, right and the appeal must be dismissed with costs. Under O. XXXIII R, 11 the appellant must pay the Court-fee to the Government.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Sadasiva Aiyar.

Karayar Condy Puthupurayil Cheria Chirikandan and others. ... *Appellants* *

v.

Aylliath Kushikath Krishna Nambiar and others ... *Respondents.*

Cheria Chirikandan *v.* Krishnan Nambiar

Malabar Law—Karnavan—Melcharath—Before the expiry of prior lease—Not binding.

A melcharath given by a karnavan two years before the expiry of the prior lease is invalid in the absence of necessity and cannot bind the succeeding karnavan.

Second appeal from the decree of the District Court of North Malabar in A. S. No. 511 of 1910 preferred against the decree of the Court of the District Munsif of Cannanore in O. S. No. 108 of 1910.

C. Madhavan Nair and *C. Kunhiraman* for Appellants.

T. Richmond and *K. N. Gopaul* for Respondents.

The Court delivered the following

Judgment:—The plaintiffs in this case sue to recover certain lands held by defendants Nos. 1 and 2 with arrears of rent. They are the holders of a melcharath from the Moppillah tarwad governed by the Marumakkathayam law. At the time of the melcharath the land was in the possession of 1st and 2nd defendants on a lease for 5 years granted by the 3rd defendant under a power of attorney from the karnavan. Only 3 years of the lease had expired, but the karnavan cancelling the power of attorney granted to the 3rd defendant executed a melcharath in plaintiff's favour for a period of 5 years commencing after the expiration of the previous lease. Defendants Nos. 1 and 2 contended that they are now holding under a new lease granted by the 3rd defendant after he became the Karnavan and that the melcharath in plaintiff's favour is invalid. The 3rd defendant supports their contention. The District Munsif held that the previous Karnavan had no right to grant the melcharath, but, on appeal, the District Judge reversed the Munsif's decision and passed a decree in plaintiff's favour. The District Judge observes:—" To

* S. A. No. 600 of 1911. 19th July 1912.

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grant a melcharath is an ordinary incident of a Karnavan's authority and quite within his powers." He cites no authority in support of his position. It is the right and duty of the Karnavan for the time being to decide what arrangement should be made for the cultivation of the family lands and whether the lease in favour of any tenant should be renewed at the expiration of the period. Here, the Karnavan two years in advance of the expiration of the prior lease, executed a melcharath in plaintiff's favour. No justification has been pleaded for such an Act. It is not alleged that there was any necessity for doing so, or that the tarwad derived any benefit from the transaction. It is impossible to countenance the proposition that the Karnavan for the time being can tie down the discretion of those that are to succeed him in the management by granting leases of family lands, when there is absolutely no reason for doing so, and the lands are being held by tenants on leases which are still in force. We must, therefore, hold that the plaintiff's title under the melcharath is not binding on the tarwad. We reverse the decree of the District Judge and restore that of the District Munsif with costs both here and in the Lower Appellate Court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Ayling and Mr. Justice Hannay.

Chambozil Moidin Kutti ... *Appellants.* *

v.

Achutambal Kunhi Koyan Muth Haji and others ... *Respondents.*

Moidin Kutti v. Kunhi Koyan

Malabar Law—Karnavan—Melcharath—Grant before expiry of lease—Validity of—Successor not bound.

In the absence of necessity a melcharath given before the expiry of the prior lease will not bind the succeeding karnavan whether the grantor was or was not alive at the time the prior lease expired.

Second appeal from the decree of the Court of the Subordinate Judge of Calicut in A. S. No. 288 of 1912 preferred against the decree of the District Munsif of Parapanangadi in O. S. No. 566 of 1911.

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* S. A. 1079 of 1913. 8th October 1914.

Moidin Kutti
v.
Kunhi Koyan

The plaintiff brought a suit to redeem with arrears of rent, etc., a Kanom of Rs. 50 to the deceased father of the 1st defendant on the ground that the plaintiff obtained a melkanom demise in respect of the suit property from the mother of the 3rd defendant. The property was alleged in the plaint to belong to the 3rd defendant's tarwad. Among other defences, the 1st defendant pleaded that the melcharath to the plaintiff was fraudulent, collusive and without consideration. The 3rd defendant contended that the melcharath to plaintiff is false, fraudulent and unsupported by consideration; and that it was not binding either on the tarwad or on her property. The first Court granted the plaintiff a decree; on appeal, the Subordinate Judge observed as follows. "It cannot be denied that there is a good deal of mischief being done by indiscriminate grants of melcharath by the Karnavans and Stanam holders in Malabar. The observations made by the High Court in S. A. No. 877 of 1911 seem to show that the powers belonging to them to grant melcharaths are not unlimited" and called for findings on two issues framed by him one of which was "Have the Karnavans and managers of Malabar tarwads power to grant melcharaths in respect of tarwad properties except for pressing family necessities and was there any such necessity for the grant of melcharath Exhibit B in this case?"

The District Munsif in submitting his finding regretted that the leading jenmis of Malabar who should have been examined regarding the nice questions of Malabar law raised by the issue were not examined because the plaintiff had not the means to cite them and the value of the case was small and found on the issue that the Karnavans and managers of Malabar tarwads have no power to grant melcharaths in respect of tarwad properties except for pressing family necessities and that there was no tarwad necessity for the execution of melcharath. Ex. B which was intended by the 3rd defendant's mother simply to accomodate her insolvent son.

The Subordinate Judge accepted the finding and held that the melcharath Ex. B was invalid and not binding on the 3rd defendant's tarwad and that though the plaint property is held under the demise sued on the plaintiff acquired no title to redeem

the kanom. He accordingly dismissed the plaintiff's suit with costs. Against that decision, the plaintiff filed a second appeal to the High Court.

N. A. Krishna Aiyar for Appellant.

C. V. Ananthakrishna Aiyar for Respondent.

N. A. Krishna Iyer. The melcharth in question was granted before the expiry of the prior kanom but at the time of its expiry, the grantor was alive and he could have granted the lands to the same grantee. The reason of *Cheria Chirikandan* v. *Krishan Nambiar* [1], cannot apply to the present, because the discretion of the succeeding Karnavans is not in any way interfered with. For the same reason *Raman Nambiar* v. *Raman Nambiar* [2] also does not apply. It is within the ordinary powers of a Karnavan to grant kanoms, ottis and other tenures sanctioned by local usage. No necessity need be shown for making such grants.

C. V. Anantakrishna Aiyar.

At the time the melcharath was granted, the period for the prior kanom had not expired. According to *Cheriya Chiri Kandan* v. *Krishnan Nambiar* [1], and *Raman Nambiar* v. *Raman Nambiar* [2] the melcharath is invalid unless it was for family necessity. It cannot be validated afterwards by the grantor being alive at the time of its expiry. Karnavans cannot also grant kanoms and ottis except for family necessity. See Moore's Malabar Law, p. 147 (3rd Ed.).

N. A. Krishna Iyer :

Granting of kanom and otti are within the ordinary powers of the karnavan. See *Ponnambilath* v. *Ponnambilath* [3].

The Court delivered the following

Judgment :—It is found that there was no family necessity to justify the melcharath Exhibit. B ; and we must hold that this transaction is not binding on the successor of the Karnavan who executed it whether the latter did or did not survive the expiry of the prior Kanom. The appeal is dismissed with costs.

1. (1912) 27 M. L. J. 690. 2. (1914) 27 M. L. J. 175.
3. (1880) I. L. R. 3 M. 169 at 175.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir John Edward Power Wallis, Kt. Officiating Chief Justice and Mr. Justice Seshagiri Aiyar.

Rajarajeswara Dorai *alias* Muthuramalinga Dorai Avergal. Rajah of Ramnad	...	*Appellant in Appeal No. 173 of 1911 (2nd Defendant).**
v.		
V. Sundarapandiaswami Thevar	...	*Respondent in Do. (3rd Plaintiff).*
Rama Raja Thevar	...	*Appellant in Appeal No.* 193 *of* 1911 (1*st Plaintiff).*
v.		
Rajarajeswari Dorai *alias* Muthuramalinga Dorai Avergal and others	...	*Respondents in Do. (Defendants Nos.2 to* 6 *and* 3*rd Plaintiff).*

Rajah of Ramnad *v.* Sundara-pandiaswami Thevar.

Hindu Law—Rule against perpetuities—Annuity to a person and his heirs may be charged on estate on default—Deed—Construction—Charge or personal covenant —Santati Paramparyamayi—Collateral heir included—Transfer of Proerty Act S. 40—Heir taking as grantee—Character of the estate not affected—Release—Construed as transfer.

Where in settlement of the rights of a claimant to the Zamindari of Ramnad, the then Zamindarni covenanted for herself and the future holders of the Zamindari that they would pay to the covenantee and his heirs (Santati Paramparyamayi) a monthly allowance of Rs. 700.

Held *Per Chief Justice*: that the allowance was not a charge on the estate but was in the nature of an annuity and could in default of payment be made a charge on a portion of the Zamindari.

Per Seshagiri Aiyar J.: that on a proper construction of the agreement, the allowance must be deemed to have been made a charge on the Zamindari but even otherwise the covenant was one annexed to the ownership of the Zamindari and ran with it under S. 40 of the Transfer of Property Act.

Held *Per curiam*: that in any view, the provision was not obnoxious to any rule of Hindu or English Law against perpetuities.

Held further: that the agreement enured for the benefit of not only the lineal heirs but also of the collateral heirs of the covenantee.

Held also: in the circumstances of the case the fact that the present Zamindar took the estate under a trust deed did not affect his liability.

Per Chief Justice. Quaere: whether it was open to the late Raja to discharge his heirs of the liability by means of a voluntary conveyance in his favour.

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*A. S. Nos. 173 and 193 of 1911. 28th October 1914.

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Per Seshagiri Aiyar J: where property is given to a person who would otherwise be entitled to it as heir, the character of the property is not changed whether the transfer is *inter vivos* or by will.

Where the admitted heir of a deceased person executed in favour of another a deed which after reciting that there was some question whether he or the other was the heir, provided that in consideration of a payment of Rs. 1000 the former should give up in favour of the latter his claim as heir of the deceased and all rights connected therewith and that the latter should enjoy the estate with all rights of ownership and that the executant and his heirs should have no claim to it.

Held, that the deed operated as a valid transfer of his rights as heir.

Appeals from the decree of the District Court of Madura in O. S. No. 17 of 1910.

The facts of the case appear sufficiently from the judgment of *Mr. Justice Seshagiri Aiyar.*

K. Srinivasa Aiyangar with *A. Krishnasami Aiyar* for the Appellant:—My first contention is that the agreement between Sivaswami Thevar and Parvathavardhani is not enforceable in law by the heirs of Sivaswami as against the heirs of Parvathavardhani. A person is not competent to contract on behalf of his heirs. *Read* v. *Price* [1].

There is a distinction in principle between a case where a right is created in favour of a particular person and that right is inherited by the heir-at-law and where the right itself is intended to come into existence for the benefit of the heir. The decision of the Privy Council in *Chundi Churn Barua* v. *Rani Sidheshwari Debi* [2], supports the above contentions. The Privy Council refer to the obligation to maintain in perpetuity as "singular and unprecedented". Their Lordships also held in that case that the successors could not enforce the covenant as to the grant of the village whether the provision in the original document was regarded either as a grant or as a covenant. Again the provision as to the payment of Rs. 700 is and cannot be a heritable estate. A perpetual annuity in gross is inconceivable in the eye of the law. There cannot be a perpetual annuity unless the gift is tantamount to a gift of the fund or the capitalized value of the annuity. *Morgan* v. *Morgan* [3], *Blight* v. *Hortnoll* [4], *Padmanund* v. *Rama* [5], *Tharasundara Debi* v. *Sarodhacharan Banerjee* [6], *In re Hargreaves* [7]. Here it cannot be contended under the terms of compromise that there was such a gift nor can it be contended that

1. (1909) 1 K. B 577. 2. (1888) L.R 15 I. A 149. s.c. I.L.R. 16 C.71 (P.C.)
3. (1893) 3 Ch 222 at 230. 4. (1881) 19 Ch. D. 294.
5. (1912) 16 C. L. J 354. 6. (1910) 12 C.L. J 146, 151.
7. (1890) 44 Ch. D. 236.

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any right in the nature of a rent charge is created under the terms of the compromise. There are no words like "out of the rents and profits," or "out of the estate" and a charge cannot be created by an implication.

2. My second contention is that even if the agreement or the compromise is one enforceable as against an heir-at-law the agreement is not enforceable as against an assignee. Excepting as between landlord and tenant there is no such thing as covenant running with the land which is binding upon the assigns of the original covenantor. *Austerberry* v. *Corporation of Oldham* [1] *Haywood* v. *The Brunswick Building Society* [2], *Sri Thakurji Maharaj* v. *Luchmi Narain* [3]. Even in equity as between two independent owners it is only a restrictive covenant that will bind an assign. In this case my client gets the Zamindari under the settlement trust deed, and therefore is not bound by any covenant binding on the assignor.

My next contention is that even if the agreement or compromise is enforceable as against the present Rajah it is only the lineal heirs of Sivaswami that are entitled to the benefit of the agreement and the plaintiff cannot claim any right as he claims the right merely as an assign of a collateral heir. The expression "Santhathi paramparyamayi" denotes 'heirs general' when the instrument purports to create an ordinary heritable estate. But that is not the necessary significance of the expression when the instrument merely provides for the payment of an allowance.

Lastly the plaintiff cannot claim any rights because there is no regular assignment by Poolar Thevar the admitted heir in his favour. There is only a release. A mere release does not operate to pass title excepting as between joint tenants. And a release is merely a disclaimer of interest.

The plaintiff cannot contend that any fresh rights were created in favour of Muthu Doraisami and his heirs under the settlement trust deed. The District Judge finds that in favour of the defendant.

S. Srinivasa Aiyangar (with *S. Sundararaja Iyengar*) for Respondent:

The contention on the other side as to the compromise creating merely a contractual obligation cannot be supported. It does create an heritable estate in favour of Sivaswami and

1. (1885) 29 Ch. D. 750. 2. (1881) 8 Q.B.D. 403.
3. (1913) 11 A.L.J. 212.

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his heirs. The contention that there can be no perpetual annuity in gross, is not sound. A perpetual annuity in gross is recognised in English and Indian Law, Vide Halsbury's Laws of England, Vol. 24 pp. 456, 465, 469.

The question as to how the right has to be worked out is distinct from the nature and validity of the right itself. An action on the covenant would lie and in an appropriate proceeding, *e. g.*, an administrative action, a fund may be set apart to answer the annuity. *Jadu Nath Poddar* v. *Rup Lal Poddar* [1], *Narak Lal* v. *Thagoo Lal* [2], *Dharam Chand Boid* v. *Mouji Shahu* [3], S. A. 1120 of 1913 unreported.

A corrody or *nibanda* is a well-known form of property recognised in Hindu Law Books. *Lakshmibai* v. *Ganpat Moroba* [4], Colebrooke's Digest Vol, I, p. 443. *Chalamanna* v. *Subbamma* [5], Besides it has also to be noted that a compromise was entered into in adjustment of the right to the Zamindari itself. See as example of cases where a perpetual annuity was recognised. The following were cited.

Muthu Raman Chetti v. *Ettappasami* [6], *Vydianatha Sastrial* v. *Eggia Venkatarama Dikshitar* [7], *Hem Chunder Chowdhury* v. *Akul Chunder Chakrabarti* [8], *Karim Nensey* v. *G. K. Heinrichs* [9].

My next contention is that in this particular case the court may infer a charge from the wording in the compromise. A charge need not be express. The expression " myself and those holding the Zamindari " in the document *i.e.*, in the compromise can only mean that Parvathavardhani and her successors are to pay their annuity out of the Zamindari of Ramnad. No particular words are necessary to create a charge. A charge can be implied even from surrounding circumstances.

Mahomed Zahur Alum v. *Chunder Cumar* [10]. On the question of charge the following cases were also referred to. *Chalamanna* v. *subbamma* [11] *Ramnad Zemindari* v. *Doraisami* [12]

1. (1906) I. L. R. 33 C. 967 at 984.
2. (1911) 13 I. C. 455.
3. (1912) 16 I. C. 440.
4. (1868) 5 Bom. H.C.R. (O. C. J.)
5. (1883) I. L. R. 7 M. 23.
6. (1899) I. L. R. 22 M. 372.
7. (1907) I. L. R. 30 M. 279.
8. (1913) 19 C. L. J. 118.
9. (1901) I. L. R. 25 B. 563 (P. C.).
10. (1879) 5 C. L. R. 449.
11. (1883) I. L. R. 7 M. 23.
12. (1884) I. L. R. 7 M. 341,

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Narayana Ananga v. *Madhawa Deo* [1]. The decision in *Chundi Churn Barua* v. *Rani Siddeshwari Debi* [2] relied on by the other side does not apply to the present case. There the only question was whether the grant in favour of future unborn generation was valid. The *Tagore case* [3] itself expressly recognises marriage and family settlement as an exception to the rule of gift in favour of unborn persons being invalid, *Radha Prasad Mullick* v. *Ranimoni Dasi* [4].

Whether or not the annuity is made a charge on the estate under the compromise it is so made under the express terms of the settlement trust deed executed by the late Rajah in favor of the present defendants. The estate is settled subject to the obligation of the trustee and after the defendant had attained majority the defendant paying a sum of Rs. 700 to Muthudoraisami and his heirs. The reference to the decree of Muthudoraisami Thevar in O. S. No. 16 of 1880 is a mere surplusage. The operative words of gift in favor of Muthudoraisami and his heirs cannot be curtailed by reference to the decree in favour of Muthudoraisami Thevar in the second part of the sentence. Possibly the settlor had in mind the compromise decree in favor of Sivaswami.

If the above contentions are upheld the question whether a bare affirmative covenant is binding on an assign at law does not arise.

Besides the settlor says in express terms that his son should take the same estate under the settlement deed as he would have taken if the estate descended to him as an heir on the death of his father.

The defendant takes the property as ancestral property and therefore is bound by all the obligations which an heir would be under *vide Minakshi Achi* v. *Chinnappa Udayan* [5]. As regards the construction of the expression '*Santhathi paramparyamai*' it is only a technical expression denoting 'heirs general' '*Santhathi*' being first in the series of heirs.

There is no point in the contention of the other side as to the document executed by Poolar Thevar being only a release and not an assignment. The construction of a document does not turn upon how it is styled. The only test is are there operative

1. (1892) I. L. R. 16 M. 268.
2. (1888) L. R. 15 I. A. 149.
3. (1872) 9 Beng. L. R. 377.
4. (1910) I. L. R. 38 C. 188.
5. (1901) I. L. R. 24 M. 689.

words of conveyance? That is a question not of law but one of construction, but in this case there is no doubt that the document contains clear words of conveyance.

A. Krishnaswami Aiyar, in reply.

The argument as to the annuity provision in the compromise being only a covenant has not been met. The argument as to a heritable estate being created in favor of Sivaswami would lead to unexpected results. It could not have been the intention of the parties that this "estate" should escheat to Government on failure of heirs nor that Sivaswami or any successor of his should be in a position to alienate the same or to release the Zamindari and his future heirs from all future obligations. The provision is therefore merely a contract on behalf of unknown heirs at law for the benefit of the future heirs at law of the other party. The estate may go into the hands of several persons and it has not been suggested how this' "heritable annuity in gross" is to be worked out especially as it is not contended and cannot be contended that the provision in the compromise is tantamount to a gift of fund or the capitalized value of the annuity.

No case has been cited where words similar to those found in the compromise were held to create a charge. In all the cases cited some such expression as "out of the estate" "out of the rents and profits" occurred. In *Mahomed Zahur Alum* v. *Chunder Cumar* [1], there was the expression "out of the estate." In *Narayana Ananga* v. *Madhava Deo* [2], no question arose as to whether the particular instrumnet created a charge or not. In reciting the facts their Lordships start with saying "the question arises with regard to a charge created under." Having regard to the context the expression must be taken to have been used in the general sense of obligation.

The contention that any fresh charge is created under the settlement trust deed is untenable. The instrument merely provides for the discharge of another obligation and refers to it in terms *ex concessi*. The obligation that is referred to in the decree in favor of Muthudoraisami Thevar is purely a personal obligation in favor of Muthu Dorai and not an obligation in favor of his heirs. It is a settled rule of construction that when

1. (1879) 5 C. L. R. 449. 2. (1892) I. L. R. 16 M. 268.

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a settlement or will provides for the discharge of another extraneous or independent obligation that had to determine the construction and not the terms in which the obligation is expressed or alluded to in the settlement or the will and so the expression "and heirs" in the settlement trust deed is a surplusage.

No point is gained by the other side calling the estate ancestral in the hands of the defendant. A person cannot create an heir of his during his lifetime. The question ancestral or not will be material only in a case of future succession and it is not the law even in cases of ordinary inheritance that ancestral estate is under greater obligations than estate which comes to the heir as separate property. The defendant therefore takes the estate only as an assignee and is not bound by any contractual obligations of the assignor.

The Court delivered the following

Judgments: *The Officiating Chief Justice*:—I agree for the reasons given by my learned brother with the decision of the District Judge that the first plaintiff has failed to prove that he was the adopted son of the deceased "Muthudorasami Thevar and that his appeal (193 of 1911) must be dismissed with costs; the memoranda of objections must also be dismissed with costs. The appeal (173 of 1911) of the Rajah of Ramnad (the 2nd defendant) against the decree in favour of the 3rd plaintiff, who is the father of the 1st plaintiff but claims as assignee of one Poolar Tevan the next reversioner of the deceased Muthudorasami Tevar has now to be dealt with. The mother of the deceased was the 2nd plaintiff and sued as his heiress, and it was on her death pending the suit the 3rd plaintiff the assignee of the next reversioner was brought on and allowed to continue the suit as her legal representative.

The claim is for an annuity of Rs. 700 settled in January 1861 on Sivasami Tevar the father of Muthudorasami and his heirs as one of the terms of a compromise of a suit in which Sivasami claimed the Zamindari of Ramnad from the then Zemindarini and her adopted son, the grandfather of the present Rajah. The litigation to which this annuity has given rise, subsequently to Sivasami's death, is succinctly stated in paragraph 1 of the District Judge's judgment. His senior widow Kulandai Nachiar disputed the legitimacy of Muthudoraisami, and after obtaining

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a decision in her favour in the High Court which was afterwards reversed by the Privy Council, instituted O. S. No. 10 of 1867 against the Rajah of Ramnad, in the Madura District, who pleaded unsuccessfully that the annuity was only settled on the lineal heirs of the deceased Sivasami. In 1880 Muthudorasami, Sivasami's son sued the Rajah in O. S. No. 16 of 1880 in the District Court of Trichinopoly, and obtained a decree under which he drew the allowance till his death in 1905. In the present suit the defence has again raised the contention that the annuity was confined to the lineal heirs of Sivasami, and the District Judge has held that it is not *res judicata* by reason of the decision in O.S. No.10 of 1867, on the ground that Kulandai Nachiar, the plaintiff in that suit cannot be considered to have represented the estate. He has however arrived at the same conclusion as the District Judge in that suit, whose judgment Exhibit R was approved by the High Court in Appeal, Exhibit R (3), and has rejected the contention that the annuity was only settled on the lineal heirs of Sivasami. I may at once dispose of this contention which was again raised before us, by saying that I see no reason to differ from those decisions. The compromise was arrived at while the decree of the Court of Sudder Adaulat dismissing Sivasami's claim to the Zamindari was under appeal to the Privy Council, and was embodied in two documents, Exhibits Q2 and Q3, one in Tamil and one in English, both signed by the pleaders of the parties and filed in the Sudder Court. The English version Exhibit Q3 is as follows: "The plaintiff has thus relinquished all right and claim (to the Zamindari) the defendant and her heirs holding the Zamindari shall, from the 1st November 1860 pay to the plaintiff and his heirs a monthly allowance of Rupees seven hundred within the 10th of every succeeding month." The words *Santhathi Paramparyamayi* used in the Tamil version are of Sanscrit origin signifying literally from generation to generation. The same word santhathi is used in an earlier portion of the document which provides that neither the plaintiff Sivasami nor his heirs shall have any claim to the Zamindari, and as pointed out more than once in the Judgment: It is absurd to suppose that it was the intention that the settlement should be binding only on the lineal heirs of Sivasami and might be disputed by collaterals. Further the District Judge stated in his Judgment of 1869 that these words were often used

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loosely among the Tamil people to signify heirs general and the same construction has often been placed on similar words by the Privy Council. It is, I think, clearly shown that under the terms of the compromise the annuity is descendible to the heirs of Sivasami generally and is not limited only to his lineal descendants.

A further contention has however been raised before us that the provision that "the defendant and her heirs holding the Zamindari shall from the 1st November 1860 pay to the plaintiff and his heirs a monthly allowance of Rs. 700 within the 10th of every succeeding month" (Exhibit Q3) is bad in law and that the plaintiff takes nothing under it. This contention was not raised in the suits of 1867 and 1880 already mentioned, or in the written statements or issues in the present suit. It no doubt appears from paragraph 9 of the District Judge's judgment that an argument based on the nature of the interest conveyed to Sivasami and his heirs was addressed to him, but he appears to have understood it as directed to the contention that the annuity was descendible only to Sivasami's heirs lineal and not to his heirs general. It is not disputed that, if the annuity were charged upon the lands of the Zamindari, it would constitute a rent charge and would be good. The District Judge has held that it is so charged and the first point for consideration is whether he is right as to this. If the annuity had been made payable out of the rents and profits, that of course would have constituted a charge, but it is made payable by the Zamindarini and her heirs holding the Zamindari and I am not satisfied that these words are sufficient to impose a charge. The grant is analagous to maintenance allowance payable by the proprietor of an impartible estate to the junior members of his family for maintenance which, it is well settled, are not deemed to be charged on the estate as a whole. Having regard to the enormous extent of the Zamindari which covers half a district, it was perhaps hardly thought necessary to create a charge binding the whole estate for so small a sum as this. We have been referred to *Narayana Ananga* v. *Madhava Deo* [1], a decision of the Privy Council in which a sum of Rs. 300 for maintenance of a junior member and his family is referred to in the beginning of their Lordships' Judgment as a charge created by the Zamindar, but a reference

1. (1892) I. L. R. 16 M. 268.

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to the printed book shows that no charge was claimed in the pleadings and that no question as to any charge was raised at the trial or in the appeal to the High Court; and that in the way the case came before their Lordships, nothing turned on the question whether there was a charge or not, and no such question apparently was raised.

Assuming that the grant was merely of an annuity payable to Sivasami and his heirs by the *Zamindarini* and her heirs holding the *Zamindari*, I do not think such a grant offends against either the rules of English or of Hindu Law. According to Halsbury's Laws of England, Vol. 24 at Rent Charge article such an annuity is in the nature of personal estate but may be made descendible in the same manner as real estate, and in India there is no reason why it should not be descendible according to the ordinary rules of Hindu Law. In case of non-payment but not otherwise, relief may be sought by administration of the estate of the deceased settlor when provision may be made for it out of the assets of the deceased; *Re Hargreaves* [1], Halsbury, Vol. 24, p. 520.

It is however contended that the compromise creates a covenant running with the land in favour of Sivasami and his heirs obnoxious to the rule in *Austerberry* v. *Corporation of Oldham* [2]. In my opinion it has not that effect, but merely renders the estate of the covenantor (including in that term not only the *Zamindarini* but also her adopted son whom she represented) liable in the hands of their legal representatives to the extent of the assets; and in this view, the 2nd defendant as their legal representative is liable to the extent of the assets in his hands which include the *Zamindari*. The defence relies on the decision of the Privy Council in *Chundi Churn Barna* v. *Rani Sidheswari Debi* [3], but in my opinion that case does not affect the question. A Rajah in 1776 had made a grant in favour of certain of his dependants confirming them in the possession of three villages, and providing that, if they were not sufficiently supported by his successors, they were to be entitled to four more villages which were named, and the suit was brought for the recovery of the four villages on the ground that the event specified had happened. Their Lordships thought that such a

1. (1890) 44 Ch. D. 236. 2. (1885) 29 Ch. D. 755.
3. (1888) 15 I. A. 149 S. C. I. L. R. 16 C. 71.

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grant might either be regarded as a present assignment to persons not yet in existence subject to a suspensive condition which might prevent its taking effect at all or for generations to come, or else as a covenant running with the Raj estate, and binding its possessor to give the villages to these persons in the event specified. In either case they held it prevented the owner from alienating his estate discharged of such future interest and imposed a restraint upon alienation contrary to the principles of Hindu Law. No such results follow from recognising the present gift which moreover is not in favour of the strangers but of members of the family. In the Tagore Case Ind. Ap. Supp. Vol. 47 at p. 70 after laying down the illegality under Hindu Law of gifts to unborn persons their Lordships make an express reservation "as to certain exceptional cases of provisions by way of contract or of conditional gift on marriage or other family provision, for which authority may be found in Hindu Law or usage". In *Karim Nensey* v. *Heinrichs* [1] their Lordships observe "gifts or contracts expressed to be for maintenance, and indefinite as regards duration, may be shown by the acts of the parties or other circumstances to be intended to operate in perpetuity; but *prima facie* they are limited to the life either of grantor or grantee"; and in *Aziz-un-nissa* v. *Ta saddug Husain Khan* [2] another decision of their Lordships the question was whether the sum of Rs. 70 payable monthly under an award was intended to create an heritable interest and it was not suggested that if it did it would be bad.

Here I may say that case cited for the plaintiff *Chalamanna* v. *Subbamma* [3] does not seem to me to afford much assistance as it was found there that the intention was to create a charge on the produce of the estate.

However the explanation of a *nibandha* or corrody taken from the *Dipacalica* in Colebrook's Digest Vol. I, page 443 includes such gifts as "I will give 150 swarnas every month of Karthigai" and "I will give monthly one swarna" in which there are no words of charge assuming however that there is no charge, I think that following the practice in the case of maintenance allowances, and also the practice in England as to making provision

1. (1901) I. L. R. 25 B. 563 at 573. 2. (1901) I. L. R. 23 A. 324. (P.C.)
3. (1883) I. L. R. 7 M 23.

in administration for perpetual annuities payable out of the estate, it will be proper to make the annuity a charge on a part of the Zamindary and that the case should be sent back for that purpose. In 1895 the Rajah's father having involved himself in difficulties executed a trust deed under which the trustees were to provide for payment of some of his liabilities and hold the estate in trust for his son the present 2nd defendant. Paragraph 23 of the deed provided such part of the income as might be necessary should be applied in payment to Muthudorasami Tevar and his heirs of the monthly sum of Rs. 700 payable under the decree in O. S. No. 16 of 1880 on the file of the District Court of Trichinopoly. At the trial the plaintiff relied upon this provision as a fresh grant in favour of the deceased and his heirs a contention rejected by the District Judge. On appeal the defence has raised a new case based on this deed, and contend that the 2nd defendant holds the Zamindari as transferee under the deed and not as heir of the late Rajah, and that he is not liable to pay the annuity sued for to the heirs of the deceased Muthudorasami as the reservation is only of the annuity to the deceased and his heirs under the decree in O. S. No. 16 of 1880, and it has since been held, as mentioned in para. 12 of the plaint that that decree was in favour of Muthudorasami personally and that his heirs are not entitled to execute it. Assuming for a moment that it is open to the defence to raise a new case like this at such a late stage of the suit, I think these contentions fail upon the merits. The reservation in para. 23 of the trust deed is expressly in favour of Muthudorasami and his heirs, and to borrow the language of Vaughan Williams L. J. *In re Rome Pike* v. *Hamlyn* [1] which was cited for the defence, it seems difficult if not impossible to suggest any reason for mentioning the heirs unless it was intended to provide for the payment of the annuity to them. The annuity was in fact payable to them, under the compromise of 1861, as every one knew, and appears to have been supposed—erroneously—it now turns out—to be also payable to the heirs under the terms of the decree in O. S. No. 16 of 1880. In these circumstances I think the words referring to the decree were mere misdescription to which the maxim *falsa demonstratio non nocet* is applicable. This conclusion is supported by the

1. (1898) 1 Ch. D. 153.

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provisions of paragraph 26 of the deed that the Zamindary and other property dealt with by the deed are to be transferred to the present Rajah (2nd defendant) his heirs and assigns "absolutely so that he may have the same kind and nature of estate, right and interest therein as he would have had if the same had devolved upon him from the settlor by right of inheritance according to the said law and custom of primogeniture and Hindu Law." Then follow certain reservations which are not material. These provisions in my opinion clearly disprove the contention, that it was the intention to transfer the Zamindari to the present Rajah discharged of the liabilities attaching to it in respect of the annuity now in question. Lastly it is far from clear that it was open to the late Rajah so to discharge his heir by means of a voluntary conveyance in his favour and in any case, I think the court should lean strongly against a construction of the deed which would have that effect. Another ground of appeal is that the District Judge was wrong in allowing the 3rd plaintiff to be brought on as the legal representative of the deceased 2nd plaintiff, the mother of Muthudorasami who survived him. As already mentioned the next reversioner is one Poolar Tevar, who on the 8th April 1910 executed a deed Exhibit Y in favour of the 3rd plaintiff, in which, after reciting that there was some question whether Poolar Tevar or the 3rd plaintiff was the next reversioner, the deed provides that in consideration of a payment of Rs. 1,000 the former should give up in favour of the third plaintiff his claim as heir of the deceased and all rights connected therewith, and that the 3rd plaintiff should enjoy the estate with all rights of ownership, and that the executant and his heirs should have no claim to it. This appears to me to be a valid transfer until it is set aside by Poolar Tevar to the 3rd plaintiff of all his rights as reversioner of the deceased, and I think the District Judge was therefore right in allowing the third plaintiff to continue the suit as the legal representative of the deceased 2nd plaintiff. The decree will be affirmed subject to the modification already mentioned as to the new charge which will be postponed to the claims of the 3rd and 4th defendants, and also by making the annuity payable on the 15th of each month, and the appeal will be dismissed with costs. The memorandum of objections is dismissed with costs.

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Seshagiri Aiyar, J: I entirely agree.

The 1st plaintiff claims to be the adopted son of one Muthudorasami Tevar who died on the morning of the 17th of November 1905. The 2nd plaintiff is the mother of the deceased. Their claim is that the monthly allowance of Rs. 700 due from the Rajah of Ramnad, the 2nd defendant in this case, is payable either to the 1st plaintiff as being the adopted son of the deceased Muthudorasami Thevar, or in the alternative if the adoption should be found against, to the 2nd plaintiff as being the mother of the deceased. The 2nd plaintiff died in the course of the suit. The 3rd plaintiff was added on his allegation that he has acquired a right to the allowance by virtue of an assignment in his favour by one Poolar Thevar who admittedly is the heir of Muthudorasami Thevar failing the adoption. The defendant, the Rajah, resisted the claim of all the three. He denied the adoption of the 1st plaintiff and, as I have held in the connected appeal that the adoption has not been proved to have taken place, that question does not arise in the present appeal. He resisted the claim of the mother on the ground that the allowance was payable only to the lineal heirs of the deceased and that consequently she was not entitled to it. As the 2nd plaintiff died since the institution of the suit her claim need not be considered in this appeal.

The defence to the claim of the 3rd plaintiff was very meagerly stated in the written statement. It was amplified in this Court a great deal. In the first place it was stated as in the case of the mother, that the allowance was not payable to any but the lineal heirs of the deceased and consequently the collateral heirs of Muthudorasami Thevar had no right to claim it. The claim was also resisted on the ground that the agreement to pay a monthly allowance from generation to generation was invalid and unenforceable. It was further pleaded that as the defendant, the Rajah, obtained the property not by inheritance from his father but by virtue of a deed of trust executed in his favour the obligation to pay the allowance did not attach to him. A further defence was raised to the effect that the deed of assignment to the 3rd plaintiff from Poolar Thevar, the heir of Muthu Dorasami was a sham transaction and that it contained no words of

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transfer which would vest the rights of Poolar Thevar in the 3rd plaintiff.

The District Judge found that the deed of assignment was valid and conferred title to the property of the deceased Muthu-doraisami Thevar, and that the Rajah as being in possession of the Zemindari of Ramnad was bound to pay the allowance to the 3rd plaintiff. The Rajah has preferred this appeal.

Before dealing with the various questions raised in the appeal it is necessary to refer to the events which have led up to the present claim. A suit was filed by Sivasamy Thevar in the Madura Civil Court O. S. No. 3 of 1853, against Parvata Vardhini Ammal for the recovery of the Zemindari of Ramnad on the ground that he was entitled to it in preference to the widow in possession. This suit was dismissed in the Court of First Instance, and the appeal against that decision to the Sudder Adaulat Court was also dismissed. Sivasami then filed an application for leave to appeal to the Privy Council. At this stage the parties entered into a compromise. In consequence of that compromise the application to appeal was withdrawn and Sivasami agreed to receive a sum of Rs. 700 monthly for himself and his heirs from the Zemindar of Ramnad in consideration of his having given up his claim to the Zemindari. Parvatha Vardhini adopted Muthu Ramalinga Sethupati who became the Zamindar of Ramnad. He was succeeded by his son Baskara Sethupati. The present defendant is his son.

The allowance continued to be paid during the lifetime of Sivasami. On his death his widow Kolandai Nachiar filed a suit for the recovery of the arrears of allowance. Meanwhile one Ramamani Ammal brought a suit to have it declared that she was the lawfully wedded wife of Sivasami and that her son Muthu-duraisami was the legitimate son of her husband. It was ultimately decided that Ramamani was not a concubine but that she was the lawfully wedded wife of the deceased Sivasami. After the termination of this litigation in favour of Ramamani and her son a suit was instituted by the son Muthudoraisami for the arrears of maintenance due to him from the date of the death of his father. It was O. S. No. 16 of 1880 on the file of the

District Court of Trichinopoly. He obtained a decree in that suit. The first and 2nd plaintiffs in this case applied to the District Court of Trichinopoly to execute the decree contending that the decree gave them a right to receive the allowance without recourse to a regular suit. The District Judge held that the original decree in favour of Muthudoraisami was not executable by his heirs and referred them to a regular suit. The present suit is the result of that order.

Mr. K. Srinivasa Aiyangar's first contention is that the right created under the razinamah was enforceable only against Parvatha Vardhini and is of no avail against her successors in the zamindari. It was admitted by the learned Vakil that the fact that it was a female holder of the zamindari that granted the allowance would not make any difference in the solution of this question. He contended that Exhibit Q2 was the only razinamah that was filed in Court and that by its terms it does not affect Parvatha-Vardhini's heirs in the *Zamindari*. The document literally translated reads "That the defendant who is in the enjoyment of the zamindari and her heirs should continue to pay the plaintiff generation to generation an allowance," etc.........This was accompanied by an English razinamah which is Exhibit Q3 in this case. It is somewhat differently worded. It says that "The plaintiff having thus completely relinquished all right and claim the defendant and her heirs holding the zamindari shall from the 1st November 1860 pay to the plaintiff and his heirs a monthly allowance, etc. It was argued that Exhibit Q3 was intended to be translation of Exhibit Q2 and that the razinamah which was put in court and acted upon was Q2. It was suggested that Exhibit Q3 must have been prepared for the purpose of transmitting a translation to the Privy Council. This is clearly wrong. Exhibit Q2 was admittedly filed on the 8th January 1861 and the direction of the Registrar to translate and send copies to the Privy Council was not given until the 18th January 1861 (*Vide* Q4). It seems more probable that Q2 and Q3 were duplicates, and were both filed in court. They were both signed in the original by the parties and their pleaders. I am of opinion that we must read Q2 and Q3 together, especially as the language of Q2 is ambiguous, to find out what the parties meant to effect by the compromise,

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Further the question as to whether under this razinamah only a personal right as against the grantor was secured was not pleaded in the written statement, and there was no issue about it. If this contention were well founded, it would have been a complete answer to the suit of Muthudoraisami Thevar in the District Court of Trichinopoly. The razinamah was acted upon for over half a century and was construed by courts and understood by the parties as conferring rights as against persons holding the zamindari. The decision in the previous suit evidenced by Exhibits S and S 2 proceeded upon this footing. I am of opinion that this contention is not open to the appellant.

Apart from these technical grounds I am satisfied that there is no substance in the argument. The document charges Parvathi Vardhini and her heirs holding the zamindari with the liability to pay this allowance. The contention that the grantor had no power to bind her descendants was raised with reference to the observation of *Channell J.* in *Read* v. *Price* [1]. That case was decided on the ground that if two or more persons are jointly liable, the liability of the deceased obligor does not pass to the administrator jointly with the obligors on whom by survivorship such liability has devolved. It is no authority for the position that no person can covenant that his heirs shall be liable. The other decisions relied upon by the learned Vakil namely, *Thara Sundara Debi* v. *Saroda Charan Banerjee* [2], *Rajah Padmanand Singh* v. *Ramaprasad Malvi* [3] *Padmanund* v. *Rama*, [4] all relate to the question as to whether under the Civil Procedure Code a future right to maintenance can be attached and sold. They have no bearing on the question we have to decide.

The case most strongly relied upon was that of *Chandi Charan Barua* v. *Sidheswari Debi* [5]. In that case the original grant recited that a perpetual remuneration should be given to certain individuals then living. In lieu of it, an immediate assignment of three villages was made. Then the document proceeded to say: "If ever in the time of my descendants you are not provided with the means of maintenance by them, then

1. (1909) I. K. B. 577.
2. (1910) 12 C. L. J. 146.
3. (1911) 14 C. L. J. 127.
4. (1912) 16 C. L. J. 354.
5. (1888) I. L. R. 16 C. 71 (P. C.).

let those descendants of yours who may be living at that time produce this deed, and taking possession of the three above mentioned villages and also of the four villages now held by me, enjoy possession of them rent free from generation to generation." After the deaths of the original grantor and grantee, the event contemplated happened. Thereupon the descendants of the grantee sued to recover possession of the additional villages by reason of the default made by the grantors's heirs. The Judicial Committee of the Privy Council held that as regards these four villages there was no contract made with the grantee at the time of the grant and that a promise to make a future grant in favour of persons yet unborn was not an enforceable contract. In the present case there was a completed contract at the time of the grant, and not merely a promise to convey in future in favour of persons yet unborn.

The case of *Narayana Ananga* v. *Madhawa Deo* [1], before the Privy Council, is similar to the present case. In that case the holder of an impartible *Zamindari* in making a grant used the following words. "I have agreed to give you, through the Collector, every month Rs. 300, on account of the maintenance of yourself and your younger brothers, three in all and the rest of your family." In a suit by the son of the youngest brother against the successor of that *Zamindar* for the allowance secured by this grant the Judicial Committee of the Privy Council gave a decree in favour of the plaintiff. Lord Hobhouse in delivering the judgment of the Committee said: "It is contended, on behalf of the defendant, that the payment of Rs. 300 a month was only to endure for the life of Jogi Deo, or, at the most, for the lives of the three brothers. It is immaterial which of those constructions is put forward. Either of them seems to their Lordships to be directly at variance with the terms of the agreement." In another place it is taken for granted that the maintenance was a charge upon the *Zamindari*. The language used in the razinamah in the present case is very similar to that employed in the document commented on by the Privy Council. If the grant in that case was regarded as not being personal to the grantee and as being enforceable against the heirs of the grantor, it is equally clear that the grant of the

1. (1892) I. L. R. 16 M. 268.

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monthly allowance in the present case enures for the benefit of the heirs of Sivasami and is enforceable against the successors of Parvatha Vardhini in the Zamindari. To my mind the case in 16 Madras is almost conclusive upon this question. In another case *Mahomed Hossain Khan* v. *Mahomed Nehaluddin Khan* [1], the Judicial Committee held that a grant of a similar nature is chargeable on the Zamindari and enforceable by the descendants of the original grantee.

Mr. S. Srinivasa Aiyangar referred us to the statement of law contained in Volume 24 of "Halsbury's Laws of England" to the effect that a grant of this nature can be secured by a contract, that it is heritable, and can be enforced against persons who succeeded to the estate of the original grantor. In S. 903 of that Volume it is stated that "The right created by an instrument (whether deed, will, codicil or statute) to receive a definite annual sum of money is an interest which may be strictly speaking, either a "rent charge" or an "annuity." There can be no question that an annuity need not be charged upon the estate. The case of *Turner* v. *Turner* [2], decided that an annuity though a personal estate, if given to a man and his heirs, would descend to the heir in default of alienation. In S. 933 the mode of creating annuities is referred to: "To create an annuity by instruments *inter vivos*, a deed, as a general rule is necessary. An annuity is frequently secured by a personal covenant." That an annuity can be for the life of the annuitant or perpetual has also been laid down in a number of decided cases. Ordinarily under the English Law the remedy open to a person in whose favor an annuity has been created is to seek for the administration of the estate of the grantor and if it is secured by will to sue the executor that a fund be set apart from which the annuity may be made payable in perpetuity. Mr. K. Srinivasa Aiyangar argued from this that as the present claim is not for administration and as there is no precedent in this country for the setting apart of a particular fund for allocating a specific portion of property from which the annuity may be paid, the suit is not sustainable. The remedy open to a person in whose favor an annuity is created is not to bring an administration action only. If assets are admitted a suit to recover arrears will

1. (1883) 13 Cal. L. R. 330. 2. (1783) 1 Bro. C. C. 316 ; Amb. 776.

lie. Of course it will always be open to the defendant to plead that he has no funds in his hands from which the annuity can be paid. It may be that the annuitant runs the risk of getting a useless decree in case he does not obtain a charge upon any specific property, for the payment of his annuity. In the present case, the plaint claims that the annuity should be charged on specific property. Even if the allowance in the present case is not to be regarded as a charge on the whole Zamindari, I see no objection to granting the plaintiff's prayer that it be secured to him by making it a charge on a portion of the property in the hands of the defendant. My view is that the language of the razinama amounts to creating a charge on the Zamindari. Even in that view it is desirable that the charge should be restricted to specific portions of the Zemindari. This is often done in maintenance cases; and it is in the interests of the defendant that he should not be fettered in the enjoyment of his property by fixing on it a general charge affecting the whole estate. For all these reasons I am of opinion that the allowance secured by Exhibits Q2, and Q3, is enforceable against the heirs of the grantor and payable from out of the assets of that gantor which are in the hands of the defendant, subject to the reservation that a specific portion of his estate be charged with its payment.

The next contention of the learned Vakil for the appellant is that this contract to pay a monthly allowance does not run with the land and therefore the grantee's heirs cannot sue to recover it from persons holding the Zamindari. Two decisions of the Allahabad High Court, viz., *Sri Thakurji Maharaj* v. *Lachmi Narain*[1] and *Ram Gobind* v. *Sri Thakurji Maharaj*[2] were cited in this connection. In both those cases there was a transfer of property on condition that the transferee should pay the land revenue upon the portion retained by the transferor and should further pay him a monthly allowance. The transferee conveyed his property to third persons. It was held that those third persons were not bound to pay that monthly allowance for all time to come. No case is quoted in the judgment nor is the deed of transfer set out. It is probable that a purely personal right was secured by the contract. In the present case the

1. (1913) 11 A. L. J. 212. 2. (1913) 11 A. L. J. 231.

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language of the grant makes the grantor's heirs liable for all time to come.

I am also inclined to think that a grant of this kind is covered by the second clause of S. 40 of the Transfer of Property Act which says "where a third person is entitled to the benefit of an obligation arising out of contract and annexed to the ownership of immoveable property, but not amounting to an interest therein or easement thereon, such right or obligation may be enforced against a transferee with notice thereof or a gratuitous transferee of the property affected thereby." In the present case Sivaswami was entitled under the contract to an allowance. The contract is annexed to the ownership of the Zamindari of Ramnad as is clear from the language employed in Exhibits Q2 and Q3. It may be that Sivaswami's right did not amount to an interest in the property. None the less according to the language of S. 40 the benefit is enforceable against a gratuitous transferee and against all transferees with notice of the original grant. There are no Indian cases upon this point, but as the language seems very apt to cover the present case, although in terms chapter 11 of the "Transfer of Property Act" is not applicable to Hindus, I see no reason why the principle of that section should not be applied to the facts of the present case.

I may refer to the decision of the Court of Appeal in *Ex parte Graham* [1] quoted by Mr. K. Srinivasa Aiyangar. It is an authority for the position that, so long as the grantee is in possession of the rents and profits of the land from which the allowance is payable, although no charge was created in his favour nor was there any covenant running with the land, the grantee could enforce his rights as against the grantor. Before dealing with the other contentions of the appellant, it is necessary to dispose of the question whether the allowance made payable under Exhibits Q2 and Q3 was a charge upon the Zamindari of Ramnad. I am inclined to hold that it is. We have to remember that the document is of 1861 when the parties were not as fully conversant wtih legal technicalities as they are to-day. It must also be borne in mind that Sivaswami claimed the whole Zamindari, and it is hardly conceivable, that he would have been

1. (1888) 42 Ch. D. 343.

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O. S. No. 16 of 1881 on the file of the District Court of Trichinopoly." It was not disputed that the decree in the District Court of Trichinopoly did not make the allowance payable to Muthu Doraiswami Thevar *and his heirs.* It was therefore argued that these words "and his heirs" in Exhibit T were "a surplusage and all that the document intended to secure was the payment to Muthu Doraiswamy Thevar of the amount of the decree. If this question had been raised in the issue the meaning of this clause could have been rendered clear. For example it is not a violent suggestion to make that what the parties intended to say was that the payment to Muthu Doraiswami Thevar and his heirs should be made as provided for in the razinamah on which the decree was obtained in Trichinopoly District Court. The language of the document is capable of being made certain by extraneous evidence. It was therefore incumbent on the defendant to have raised a specific issue whether the trust deed did oblige him to pay the descendants of Muthu Doraiswami Thevar, the maintenance from out of the estate. The language of the residuary clause 26 seems to imply that all subsisting obligations upon the zamindari are to be met by the defendant from the income of the zamindari. I cannot, therefore, accept the contention that the fact of the execution of the trust deed makes a difference in regard to the position of the defendant.

It is further argued that under the assignment deed to the third plaintiff no right to the maintenance passed to him. It is common ground that Poolar Thevar, the assignor, was the heir to the estate and effects of Muthu Doraiswami. The deed of assignment Exhibit Y, says :—"I have hereby given up to you the title of heir possessed by me and all rights connected therewith." It sets out by saying that third plaintiff himself was the nearest heir. It also says that in case he is not the heir and if it is held that Poolar Thevar the executant of Exhibit Y, is the heir, all the right of the latter should devolve on the third plaintiff. The language of the document is very explicit, and I feel no manner of doubt that under Exhibit Y all the rights of Poolar Thevar accrued to the 3rd plaintiff.

The last question to be considered is whether the fact that Poolar Thevar was not the lineal descendant of Muthu Duraiswami but was only a collateral, disentitles him from recovering

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the maintenance or from assigning it to the 3rd plaintiff. Such a contention was not raised when Kolandai Nachiar the widow of Sivaswami Thevar brought a suit to recover the maintenance. She was not the lineal heir of Sivaswami. The words used in Exhibit Q2 and Q3 are that Sivaswami was entitled to enjoy the allowance, *Santhathi Paramparyamay.* Those words convey a heritable estate from generation to generation. They are even stronger than the words *Puthra Pouthra Paramparya.* No authority has been quoted for the proposition that the word "Santhathi" is to be restricted to the lineal descendants. It means the heirs in general and as Poolar Thevar is undoubtedly in the line of heirs to Sivaswami he is entitled to recover the allowance; and his assignee has the same rights to it. I am of opinion that the appeal fails and should be dismissed with costs, subject to the modification suggested by the learned Chief Justice.

[In A. 193 of 1911 His Lordship also concurred with the learned Chief Justice in holding that the plaintiff had failed to prove that he was the adopted son of deceased Muthu Doraisami Thevar and dismissed the appeal with costs.]

The memorandum of objections is also dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Sir John Edward Power Wallis, Kt. Chief Justice and Mr. Justice Seshagiri Aiyar.

Sreemanthu Raja Yarlagadda Mallikharjuna Nayadu Bahadur, Zamindar Garu of Chellapalli ... *Appellant**
(Plaintiff).

v.

Rajalapati Somayya and others ... *Respondents.*
(Defendants).

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Madras Estates Land Act I of 1908, Ss. 8, 183, 185—Private land—Conversion of Jeroiti into Kambattam—Conversion—Evidence—Permissibility of—Private land—Meaning of—Acquisition of Kudiwaram and letting as private land—Proviso and exception.

Per Chief Justice : S. 8 of the Estates Land Act has not the effect of retrospectively imposing an absolute prohibition on the conversion of ryoti into private land not to be found in the definition or in the section dealing with the evidence as to what is private land. But a conversion of that kind should be proved by very clear and satisfactory evidence

The fact that the Kudivaram rights in certain lands were acquired by the landlord and thereafter for a number of years he was letting out the lands as Kambattam without ever cultivating them himself is not sufficient to effect such conversion.

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*A. S. No. 104 of 1913. 26th November 1914.

Private land is held by the landholder as landholder and not as ryot.

Per Seshagiri Aiyar, J :—Land originally seri cannot become the private land of the landholder except in the one case mentioned in S. 185 *viz.*, when it is proved to have been cultivated as private land by the landholder himself by his own servants or by hired labour &c. for 12 years immediately before the commencement of the Act.

Meaning of the term *private land* discussed.

Proviso and exception distinguished.

Appeal from the decree of the Court of the Temporary Subordinate Judge of Masulipatam in O. S. No. 22 of 1910.

L.A. Govindaraghava Iyer and *C.V. Ananthakrishna Iyer* for Appellants.

V. Ramesam and *V. Rama Doss* for Respondents.

The Court delivered the following

Judgments :—*Chief Justice* :—This case raises a question of considerable importance as to what constitutes private land under the Madras Estates Land Act, 1908. The Subordinate Judge has decided the question very largely with reference to speeches made while the Bill was passing through the Council, in which private lands were said to represent lands which were granted free of assessment by the Mahomedan Government to the Zamindars as part of their remuneration for their services. However this may be, what the Court has to see is whether the land in question comes within the definition in S. 3 (10) of the Act, where private land is said to mean "the domain or home farm land of a landholder by whatever designation known such as Kambattam Khas Seri, or Pannai."

Here it may be well to note that the word domain in this connection is explained by Webster citing Shantore as meaning "the land about the mansion home of a Lord and in his immediate occupancy". S. 185 prescribed certain rules of evidence as to whether any land is a private land or not, and provides that land shall be deemed not to be private land until the contrary is shown. That it is the intention of the legislature that this should be strictly proved is also to be gathered from the provisions of S. 183 as to ascertaining and recording whether any land is a private land in which the Revenue officer is directed to disregard any agreement or anything contained in any compromise, or in any decree proved to his satisfaction to have been obtained by fraud or collusion, and not to register the land as private unless it is proved to be such by satisfactory evidence of the nature prescribed in S. 185. Under that section regard is

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to be had to the local custom, and to the question whether the land was before the first day of July 1898 specifically let as private land, and to any other evidence that may be produced. Then we have the proviso, "Provided that all land which is proved to have been cultivated as private land by the land-holder himself by his own servants or by hired labour with his own or hired stock for twelve years immediately before the commencement of this Act, shall be deemed to be landholder's private land".

Mr. Govindaraghava Aiyar very properly relied on the fact that this provision is enacted by way of proviso to the body of the section and not by way of exception, and argued that it should not be construed as inconsistent with the body of the section, and therefore that the fact that the land had been so cultivated by the proprietors would have been evidence that the land was private land apart from the proviso. This is no doubt a sound principle of construction and was recently applied by the Privy Council in *Mahaprasad Singh* v. *Ramani Mohan Singh* [1], but it is scarcely necessary to rely upon it because it is expressly provided in the body of the section that the fact that the land has been let as private land is evidence of its being such, and the case of its being cultivated as such by the owner himself is of course much stronger. For the respondent, however, it is contended that once it is shown that the land in question was at one time ordinary ryoti land or *seri* as it is called in the district in question, evidence that subsequently it has been dealt with as private land, though admissible under S. 185, is of no avail, because by virtue of provisions of S. 8, which are retrospective the land must be taken not to be private land, unless the conditions of the proviso to S. 185 are satisfied. As to this it may be observed that, if this be so, the proviso should rather have appeared as an exception to S. 8.

Now it is well settled that retrospective enactments must be strictly construed, and it is therefore necessary to examine carefully the provisions of S. 8 to see if they really have the result contended for. Sub-section (1) provides that whenever before or after the commencement of the Act the entire interests of

1. (1914) 27 M. L. J. 459 at 466.

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the landholder and the occupancy ryot in any land in the holding have become united in the same person in the circumstances specified in the section, such person shall have no right to hold the land as a ryot but shall hold it as a landholder and sub-section (3) further provides that such merger shall not have the effect of converting ryoti land into private land. I do not think the latter provision is of much importance, as it only provides that the merger in question shall not convert ryoti land into private land, and cannot be read as enacting that such land cannot be converted into private land by being subsequently cultivated or let as such. This effect must be produced, if at all, by virtue of the provision in sub-section (1) that in such a case the owner "shall have no right to hold the land as a ryot but shall hold it as a landholder" ; but for this provision a landholder who had acquired the Kudivaram rights in a holding could have escaped from the operation of the Act by purporting to let the lands in his capacity as ryot, seeing that ryots are free to sublet their lands on what terms they please, whereas the powers of a landholder are governed by the provisions of the Act. The provision that the owner shall not hold the land as a ryot was intended to guard against this mischief, and is not in my opinion of itself sufficient if the section be construed strictly, to prevent the owner from subsequently converting such land into private land by cultivating or letting it as such. We have then to see whether the further provision that after such merger the owner shall hold the land as a landholder has that effect. Now "landholder" is defined in S. 3 (5) as meaning a person holding an estate, and the definition of estate in S. 3 (2) is such as to include both ryoti and private land; and as already pointed out private land is defined as "the domain or home farm land of a landholder". In this state of things, and construing the sub-section strictly as we are bound to construe it, I do not think it can be said that a landholder holding the land as private land is not holding it as a landholder rather than as a ryot for that is the distinction contemplated in the section. This appears to be in accordance with the opinion expressed by Sadasiva Aiyar, J, in *Venkata Sastrulu* v. *Sitaramudu* [1].

1, (1914) 26 M. L. J. 585.

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In the decision in *Chintamreddi Sanyasi* v. *Rajiasagi Appalanarasimha Raja Garu* [1], to which I was a party the provisions of S. 8 are not referred to in the judgment but as appears from a reference to the printed papers that was a case of immemorial waste being cultivated as private land and not a case in which the interests of a landholder and an occupancy ryot had become merged in the manner specified in S. 8. I have come to the conclusion that the effect of S. 8 is not to impose retrospectively an absolute prohibition of the conversion of ryoti into private land not to be found in the definition, or in the section specially dealing with evidence as to what is private land; and I may say that, if the legislature had intended to exclude from the category of domain or home farm land, lands which had been cultivated as such for a century or more on the ground that such land had not at some remote period been held as ordinary ryoti land, it would I think have expressed its intention in clear and unambiguous language. While I feel bound to arrive at this conclusion I think that it is very necessary that an actual conversion from ryoti into private land should be proved by very clear and satisfactory evidence.

We have next to see whether the evidence in this case is sufficient for the purpose. In this connection it is to be borne in mind that numerous instances have come before the Courts in which subsequent to the decision of *Chokalinga's case* [2], Zamindars succeeded in inserting in pattas and muchilikas terms negativing the existence of occupancy right, and that one way of effecting this purpose was to deal with the land as Kambattam or home farm land, even though it had never been cultivated by the Zamindar himself and there was no intention of so cultivating it. Now in the present case we find that the earliest accounts of the village of the year 1836 show that it contained 6 puttis or about 102 acres of *savaram* lands in which the suit lands were not included, and that 800 acres or more than a third of the whole acreage of the village is now classed as Kambattam. So too the accounts of 1866 Exhibits 18 and 19 and of 1867. Exhibits 3 and 12 show only 49 acres and 54 acres under cultivation as Kambattam in these years. The evidence in the present case shows how the extention came about. The character of the suit

1. (1914) M. W. N. 766. 2. (1870) 6 M. H. C. R. 164.

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lands was called in question in O. S. No. 10 of 1881 in the District Court of Masulipatam when the District Judge decided that the predecessors of the present owners had executed muchilikas agreeing to hold the land as kambattam but did not knowingly consent to the change from seri to Kambattam. The High Court in Exhibit J. set aside his decree on the ground that the only defence set up by the defendants was that they had not executed the muchilikas. This was all that was decided, but the learned Judges observed that the District Judge found that the Zamindar was at liberty to change seri into Kambattam on the occurrence of a vacancy and had overlooked the fact that such a vacancy had occurred in 1874 on the death of Korrapati Venkanna in whose name the lands then stood. It may fairly be inferred that no documents were then preferred in evidence in which the land was treated as Kambattam prior to 1875 and the documents relied on in the present case are even later. In that case the learned Judges put the onus of proving that the land was seri on the defendants, and held they had not discharged it. As the law now stands, the burden is on the Zamindar to show that the suit lands come within the definition in S. 3, as forming part of his domain or home farm lands. There was no evidence in that case that he had ever cultivated them himself. The earliest evidence that they had been treated as Kambattam related to 1875. Shortly after the decision in *Chokkalinga's case* after which the Zamindars endeavoured to get their ryots contract themselves in one way or another out of their occupancy rights, a process which apparently explains the extraordinary increase in the amount of land classed as Kambattam in recent years. The evidence that the Zamindar cultivated these lands in recent years is negatived by the Karnam who otherwise shows himself favourable to the Zamindar. He says that out of 2300 acres in the village 800 are classed as Kambattam and that of these the Zamindar cultivates 200 acres himself but not always the same 200 acres. It is not shown that he ever cultivated the suit lands. On the contrary the evidence is that they have always been cultivated by tenants.

Though the fact that the lands have been let as Kambattam is evidence under S. 185 that these are private lands, and

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though the provisions of S. 183 do not apply to the Civil Court still, as I have already said, I think the fact that lands really were at some time domain or home farm lands should be strictly proved. Once it is shown as here that they were ryoti down to a certain date, the effect of S. 8 is that even if the Zamindar subsequently acquired the Kudivaram right that would not of itself convert them into private land, and we have to see whether what has happened subsequently is sufficient to convert the land into private land that is to say into domain or home farm land. It does not seem to me that calling the lands Kambattam and letting them on terms which negative occupancy right with a view to prevent the assertion of such right is sufficient to convert them into private lands within the meaning of the definition.

The Subordinate Judge has found and I agree with him that the suit lands were never cultivated by the Zamindar as part of his home farm lands, and it seems to me that his treatment of them as Kambattam was merely colourable for the purpose of defeating the occupancy rights of the tenants. In some parts of India lands of this kind are known as *Sir* lands and this is one of the terms mentioned in the definition. In *Budley* v. *Bukhtoo*[1] it was held that *sir* land is land which a Zamindar has cultivated himself and intends to retain as resumable for cultivation by himself even when from time to time he demises it for a season. I think that this test may well be applied here, and that, as the plaintiff has failed to satisfy it, the appeal fails and must be dismissed with costs.

Seshagiri Aiyar J : The plaintiff sues for a declaration that the lands in suit are his home farm lands. The defendants claim them as their Jeroity. The Subordinate Judge dismissed the suit.

I see no reason to differ from the conclusion at which the lower Court has arrived. The Subordinate Judge found that from the year 1864, the lands were treated by the plaintiff as his Kambattam or home farm lands and that they were held as Seri or Jeroity lands from 1866 to 1883 by the defendants and their predecessors. The appellant has convinced us that in the year 1879, the lands were treated as Kambattam. Exhibit J. the

1. (1871) 3 N.-W. P. 203.

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judgment of the High Court, Exhibit V, the cultivation account for 1880, Exhibit XIII, the hissab account for 1879, show that from the year 1879 onwards, the plaintiff dealt with the lands as his Kambattam. The Subordinate Judge's finding must be modified to this extent. As regards the earlier period, discussed by the Subordinate Judge in paragraph 11 of his Judgment Mr. Govindaraghava Aiyar contended that the documents commented upon do not support his finding. I see no force in this argument. Exhibit X the Adangal Account of 1868 is against this contention. Whenever land is mentioned as Kambattam in this account, the Zamindar is mentioned as owner and the person actually cultivating the field under him is entered as being the cultivator. The two entries referred to by the Subordinate Judge fully support this view. With reference to the plaint lands, the Zamindar is not entered as owner. Exhibit XVIII, the landwari account of the plots in 1866, shows the defendant's predecessor as the owner. Exhibit XIX is to the same effect. Exhibits III and XII the accounts for 1867, are of the same character as Exhibits XVIII and XIX. Exhibit XI for the year 1874 which is an account of Seri lands shows that one Korapatti Venkanna was the owner of the plaint lands. Even if we are not prepared to accept the suggestion that this Venkanna was a relation of the defendants, the entry shows that the Zamindar was not the owner. The learned Vakil for the appellant suggested that the entries in these documents, especially in Ex. X, may be due to the fact that the persons entered as cultivators were let in for the first time by the zamindar. There is no trace of this explanation in the evidence; on the whole, I see no reason to differ from the Subordinate Judge in his conclusion that from 1866 to 1874, the lands were held and enjoyed as seri.

On these facts, the question for determination is whether lands once enjoyed as seri with tenant right can be converted by the Zamindar into his Kambattam. The question is not free from difficulty. The only sections that have a bearing upon this point are 3 (10), 6, 8, 181 and 185. S. 3 (10) defines "Private Land." The meaning of the word domain is not given in the Act. The learned Chief Justice pointed out in the course of the argument that it was synonymous with Demesne. In the

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Encyclopedia Britannica VI, iii it is explained as follows:—Demesne (Demeine, Demain, Domain etc.) that portion of the land of a manor not granted out in freehold tenancy, but (a) retained by the Lord of the Manor for his own use and occuption or (b) or let out as tenemental land to his retainers or "villani". This Demesne land, originally held at the will of the Lord, in course of time came to acquirefixity of tenure and developed into the modern copyhold (see Manor). It is from demesne as used in sense (a) that the modern restricted use of the word comes, *i. e.*, land immediately surrounding the mansion or dwelling house, the park or chase". I have no doubt that it is in a similar sense that the legislature has used the expression. The special incidents of such property are that it must have been an appurtenance to the general holding and should have been in the personal occupation of the zamindar. Some indication of its characteristics is to be found in the fifth report relating to the Madras Presidency. In giving instructions to Collectors regarding the properties to be taken into account in making the permanent settlement with the zamindars, one of the items to be included is thus described;—"All private lands at present appropriated by the *Zamindars* and other landholders to the subsistence of themselves and families, as well as all lands held by private servants and dependants, will be considered as forming part of the Circar land, and therefore responsible for the public Jumma." This is practically the definition of private land. Ordinarily a private land must have that character from prior to the permanent settlement, except in certain cases to which I shall refer later on. The theory is that *prima facie* a Jeroiti or seri land cannot be converted into private land. This view is strengthened by the last explanation to S. 6 which lays down that an occupancy right in land is not lost by the tenant becoming the landholder. The character of the holding remains whatever may be the change in the position of the owner of it. Then we come to S. 8 cl. (1) of that section, deals with the merger of occupancy right in certain cases. A great deal of argument was directed towards the clause "by transfer, succession or otherwise". I think there can be no doubt that a bare surrender will not come under the expression "otherwise" because a surrender without more does not confer a right to the property. I had to

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consider this question at some length in *Venkata Sastrulu* v. *Sitaramudu* [1]. I adhere to the view therein expressed that if the surrender has been accepted and acted upon, it would amount to a mode of acquisition and would come under the expression "otherwise." In that view Cl. 3 of S. 8 will preclude the conversion of a ryoti land, the occupancy right in which had become vested in the landholder by an accepted surrender, into a home farm land. I cannot accede to the contention of Mr. Govindaragahava Aiyar that clauses 1 and 3 contemplate a bare merger without more and that when such a merger has been given effect to by treating the land as home farm land it will not be obnoxious to the rule enunciated in S. 8. Although it may not be competent to Courts to examine the policy underlying an enactment apart from the actual language employed in the sections, it is our duty to give effect to such a policy when it appears clearly from the language employed. The definition section and S. 8 leave no doubt in my mind that the legislature demands the strictest proof of a land being kambattam. This is made clearer still by S. 181 which enacting that a landholder can allow his private land to be converted into ryoti land makes no provision for the converse case. The only other section that has to be considered is S. 185. There can be no doubt, as pointed out by Mr. Govindaragava Aiyar, the proviso to that section is not in the nature of an exception. *Mullins* v. *Treasurer of Surrey* [2], lays down that a proviso is in the nature of substantive rule and should not be treated as an exception to the proposition stated in a section. See also *Mahaprasad Singh* v. *Ramani Mahan Singh* [3]. Accepting this position, I think that the first part of S. 185 deals with the determination of the question whether a particular field is ryoti or Kambattam, where nothing is known about its origin. If it was originally ryoti the rule of evidence contained in the first part of S. 185 can have no application because that would practically abrogate the principle enunciated in S. 8, cl. 1 and 3. The proviso to S. 185 is really an exception to S. 8, cl. 3. The object of the proviso is to enable the landlord to say that although the land was seri he has by his own servants, or by hired labour cultivated the land for twelve years preceding the Act and

1. (1914) 26 M. L. J. 585.
2. (1880) 5. Q. B. D. 173.
3. (1914) 27 M. L. J. 459. (P.C.)

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that consequently it should be regarded as his home farm land. An irrebuttable presumption is to be drawn from such a conduct. If one remembers that a home farm land is that which has been ordinarily cultivated personally by the landlord at the outset, the meaning of such a reservation in favour of the landholder will be apparent. This conclusion carries out the scheme of the legislature which seems to be opposed to the augmentation of the private land of the landholders, excepting the special instance mentioned in the proviso to S. 185. This view receives support from the observations of the learned Judges who decided *Cheekati Zamindar* v. *Ranasooru Dhora* [1]. The object of the Estates Land Act is to prevent the conversion of ryoti land into Kambattam land which process had been adopted largely since the decision in *Chockalinga Pillai's case* [2]. My conclusion is in accordance with the decision of Mr. Justice Ayling and myself in S. A. No. 275 of 1913. S. A. No. 1402 of 1912 decided by Sadasiva Aiyar and Napier JJ. is also to the same effect. The decision of the learned Chief Justice and Mr. Justice Ayling in *Chintamareddi Sanyasi* v. *Sree Rajasagi Appala Narasimha Garu* [3] is not oppposed to this conclusion. The land in that case was never ryoti land. It only laid down that a private land can come into existence even after the permanent settlement. The proviso to S. 185 is intended to enact such a rule.

The decision of the Subordinate Judge is right and this appeal must be dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Kumarasami Sastri.

Natesa Mooppan ... *Petitioners**
(Defendant)

v.

K. R. Ramachendra Aiyar ... *Respondent*
(Plaintiff).

Natesa Mooppan v. Ramachandra Aiyar.

Legal Practitioner's Act S. 28—Promissory note for outfees not filed in Court—Dismissal of suit—Civil Procedure Code, O. 2, R. 2—Suit on original cause of action not barred—Limitation Act, S. 19—Acknowledgment—Practice—Point of limitation raised in revision—Mixed question of law and fact—Not open.

Dismissal of a suit on a promissory note given to a Vakil for out fees on the ground that it was not filed in Court as required by S. 28 of the Legal Practitioner's

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* C. R. P. No. 40 of 1913. 13th November 1914.

1. (1899) I.L.R. 23 M. 318. 2. (1870) 6 M.H.C. R. 164.

3. (1914) M. W. N. 766.

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Kumarasami Sastri J.

Act does not bar a fresh suit on the original cause of action and the promissory note may be used as an acknowledgment of the original liability.

A point of limitation cannot be raised for the first time in the High Court in revision when it involves a mixed question of law and fact.

Petition under S. 26 of Act, IX of 1887 praying the High Court to revise the decree of the District Munsif of Tanjore in S. C.S No. 1900 of 1912.

V. Rathnasomanathan for Petitioner.

G. S. Ramachendra Aiyar for Respondent.

The Court delivered the following.

Judgment:—The defendant is the petitioner. The plaintiff who is a Vakil practising in Tanjore sued to recover Rs. 136 with costs and further interest alleged to be due on a promissory note dated 28th July 1909 for Rs. 100 executed by the defendant in his favor. The defendant, while admitting execution pleaded that there was no consideration for the promissory note, that it was obtained from him by the exercise of undue influence and that the note is void as the plaintiff did not file it in Court as required by S. 28 of the Legal Practitioner's Act. It was also alleged that the suit was barred under Or. II, R. 2, C. P. C. as the plaintiff had obtained another promissory note in respect of fees due to him and had not included this claim in the suit (O. S. No. 351 of 1912) filed on that promissory note. The District Munsif found against the defendant and passed a decree for the amount. There is no evidence to shew that the promissory note was either without consideration or was executed owing to the exercise of undue influence. The defendant examined himself and two witnesses. His first witness who is plaintiff's gumastah, states that the plaintiff had paid Rs. 60 which was payable by the defendant to the commissioner and that the promissory note was executed in respect of that sum and also of other sundry items due to the plaintiff. The defendant, who examined himself as his second witness, says that the plaintiff was paying batta, out-fees and all charges in connection with the suit which he (defendant) filed and in which he had engaged the services of the plaintiff. He states that the plaintiff told him that commission fees had to be paid and that he executed the note at plaintiff's request. Defendant's third witness says nothing about the promissory note. The plaintiff deposes that Ex. A was executed in consideration of Rs. 60 paid by him as commissioner's fees, that outfees to the extent of Rs. 15 or,

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20 had been spent by him in respect of batta, etc., and that defendant had also borrowed from him Rs. 15 or 20 in cash. There is, therefore, ample evidence to show that the promissory note was executed for consideration and I agree with the District Munsif in holding that the promissory note was executed by the defendant to secure moneys actually due by him to the plaintiff.

It has been argued by the counsel for the petitioner that plaintiff has not produced any accounts and that consequently his case ought to be disbelieved. I cannot help remarking that the plaintiff ought to have kept proper accounts and that professional gentlemen who do not keep accounts lay themselves open to a great deal of misconception and suspicion however honest they may be: but in the present case the defendant admits that the plaintiff was paying out-fees and he does not pretend to have made any payment to the plaintiff for out-fees payable by him. His statement that the note was executed by the exercise of undue influence and without consideration is false and under these circumstances, I do not think that the fact that the plaintiff did not keep proper accounts exonerates the defendant from liability to pay the debt actually due.

The next question is as regards the validity of the promissory note having regard to S. 28 of the Legal Practitioner's Act. It has been held in *Subba Pillai* v. *Ramasami Aiyar* [1], that a promissory note obtained by a pleader in respect of out-fees disbursed by him fell within S. 28 of the Legal Practitioner's Act as being an agreement respecting the amount of payment for charges incurred or disbursements made by the pleader in respect of the suit in which he had been retained and that the note was invalid if it was not filed in court. In the present case it is admitted that the note was not filed in court and therefore the note cannot be sued on. This, however, would not deter the plaintiff from getting a decree in respect of the sums actually spent by him, and in the case above cited a decree was passed for the amount so spent notwithstanding the fact that the promissory note was invalid. In *Krishnasami* v. *Kesava* [2], it was held that the fact that the promissory note which was sued upon was invalid owing to its not having been filed in court as required by the Legal Practitioner's Act did not prevent the

1. (1903) I. L. R. 27 M. 512. 2. (1890) I. L. R. 14 M. 68.

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court from decreeing the sum which was reasonably due for fees. A similar view was taken in *Anantayya* v. *Padmayya* [1].

The District Munsif found on the evidence that the sum of Rs. 100 claimed by plaintiff was actually due by defendant and I do not think he erred in passing a decree for the amount. It is argued that the claim to recover moneys alleged to be due would be barred by limitation as the suit on the promissory note was filed on the last day allowed by the law of limitation. The plea of limitation was not raised in the Lower Court and in the present case it involves a mixed question of law and fact as the dates when the payments for out-fees were made do not appear: the question will also arise as to when the proceedings in the suit in which plaintiff was engaged as a Vakil terminated.

There is nothing to prevent the promissory note from operating as an acknowledgment of liability even though it may not be sued upon owing to its not having been filed in court as required by the Legal Practitioner's Act.

I do not see how it can be said that the present suit is barred by R. 2, O. II of the C. P. C. The cause of action in this suit is different from the cause of action in the previous suit and the plaintiff was not bound to join both causes of action in one suit.

I am however of opinion that the District Munsif erred in allowing interest at the rate stipulated in the promissory note as the note was not enforceable. There was no contract to pay interest apart from the note and plaintiff has not proved notice in writing so as to bring the case within the Interest Act.

I modify the decree of the Lower Court by passing a decree for Rs. 100 with interest from date of decree at 6 p.c. and proportionate costs throughout.

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1. (1902) I.L. R. 26 M. 278.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Ayling and Mr. Justice Hannay.

The Crown Prosecutor ... *Appellant* * *in both.*

v.

P. R. Ganapathi Aiyar... *Accused in C.C. No.* 15569 *of* 1914.
Perumal ... *Accused in C.C. No.* 15570 *of* 1914.

Emperor v. Ganapathi Aiyar

Madras City Municipal Act (III of 1904), S. 409—Bye-law 169—Food—Meaning of—Drink "not included"—Aerated Waters—Unwholesome—Exposure for sale of.

The word "food" in byelaw 169 framed under S 409 of the City Municipal Act does not include "drink"; consequently a person cannot be said to violate that bye-law by exposing for sale unwholesome aerated waters.

Appeals under S. 417 of the Code of Criminal Procedure 1898 against the acquittal of the aforesaid accused by the 4th Presidency Magistrate, Egmore, Madras in C. C. Nos. 15569 and 15570 of 1914 on his file.

T. C. Adam Crown Prosecutor for Government.

C. V. Ananthakrishna Aiyar for the accused in Cr. A. No. 549 of 1914.

The Court delivered the following

Judgment:—In these cases the Local Government appeals against an order of acquittal in Calendar Case Nos. 15569 and 15570 of 1914 on the file of the Presidency Magistrate. In both cases the charge against the accused was that they had exposed for sale Aerated Waters unwholesome and unfit for human consumption contrary to bye-law S. 169 framed under S. 409 (19) of the Madras City Municipal Act (III of 1904) an offence punishable under bye-law 177.

By S. 409, cl. 19 of the Act, the Corporation is authorised to make bye-laws to provide " for the prevention of the sale or exposure for sale of unwholesome meat, fish or provisions; and securing the efficient inspection and sanitary regulation of shops in which articles intended for human food, or drugs, are kept or sold." The bye-law in question (No. 169) has evidently been framed with reference to the 1st part of clause 19 as the 2nd part of that clause relates to inspection and the sanitary regulation of shops.

The bye-law is as follows:— " No person shall expose for sale or keep for the purposes of sale any article intended for

* Cr. Appeals Nos. 549 and 550 of 1914. 4th December 1914.

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human food which is unwholesome or unfit for human consumption". The decision of the cases before us turns on the question whether the word "food" in the bye-law includes drink or not. The Magistrate has held that it does not. The learned crown prosecutor contends that the word "food" does include drink and in support of his contention refers to the definition of "food" given in the Standard Century Dictionaries, in the English Sale of Food and Drugs Acts and in S. 251 of the Bengal District Municipalities Act (III of 1884). Admittedly the word "food" in ordinary parlance would not include "drink" and there is nothing in the dictionaries referred to which would support a contrary view. It is argued however that in the law the word food does include every article used for drink by man other than drugs or water. This, no doubt, is the definition of the term "food" in the English Sale of Food and Drugs Act (see Halsbury Vol. XV, p. 5) but it is evident that that definition was made for the purposes of those Acts and it is so stated in the passage in Halsbury which is above referred to. Similarly with regard to S. 251 of Bengal District Municipalities Act. By that section "food" is defined to include every article used by man for food or drink except drugs or water. But there again, the definition was introduced into the Act by an Amendment in 1886 and has special reference to the Act alone. The fact that it was found necessary to introduce the definition by a subsequent amendment of the Act is, of course a point against the contention of the learned Crown Prosecutor. It is also pointed out by the learned Vakil for the accused that the Madras City Municipal Act can hardly be construed by reference to a Mofussil Act of Bengal.

There is no definition of the term "food" either in the Madras City Municipal Act, or, apparently in the corresponding Acts in Calcutta or Bombay. The point which militates most strongly against the meaning which the learned Crown Prosecutor seeks to apply to the term "food" is the fact that in the body of the Madras Act itself in several places the words "food and drink" occur, indicating that it was not intended that the latter term should be included in the former. See Ss. 357 and 358. It is difficult in the face of these sections to hold that the term "food" in the bye-law in question does include drink. It is immaterial for the purposes of these cases that the

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Magistrate has held that Aerated water and lemonade are not "provisions" within the meaning of S. 409 (19) as the word "provisions" does not occur in the bye-law under which the prosecutions were brought. It may be mentioned that in the Dictionaries referred to by the learned Crown Prosecutor the word ' provisions" is given as synonym of " food."

The Municipal Council has special powers with reference to the manufacture of Aerated water under S. 328 of the Act. Possibly this may have been thought a sufficient safegaurd by the Legislature for securing the purity of aerated waters. However that may be, as there is nothing in the Act or bye-laws to support the view for which the Crown Prosecutor contends, namely that the term "food" includes "drinks" other than drugs or water, the conclusion at which the lower Court has arrived on the point must be upheld. The acquittals are right and these appeals are accordingly dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Seshagiri Aiyar and Mr. Justice Kumaraswami Sastri.

Doraisami Reddi and others ... *Appellants**
(Defendants)

v.

C. Venkatachalam Pillai ... *Respondent in all*
(Plaintiff)

Doraisami Reddi v. Venkatachalam Pillai.

Estates Land Act, Sch. Part A, Art. 8—Limitation Act, Art. 110—S. 15—Suit for ascertainment of rent—Meaning of—Not confined to proceedings in Revenue Courts—Interpleader suit as to right to collect cess—Pendency of—Injunction granted by first Court—Dismissal of suit by appellate Court—Effect of remand by High Court—Jurisdiction—Civil Courts—Extent of.

The suits or proceedings for ascertainment of rent contemplated by the judgment of their Lordships of the Privy Council in *Rangayya Appa Rao* v. *Bobba Sriramulu* (1), and by Art. 8 (schedule to the Estates Land Act, Part A) are not necessarily suits or proceedings in Revenue Courts, but an interpleader suit brought by the tenant making the Government and the landlord parties to ascertain which of them is entitled to collect water cess from him is not such a suit or proceeding.

The fact that in any such suit or proceeding an alternative claim for rent could have been made does not affect the question.

The jurisdiction of the Civil Courts is not taken away in regard to claims for rent except in so far as there is special exclusion contained in any enactment

*S.A. No. 529 to 536 538 539 11th August 1914.
854 and 968 of 1913

1. (1903) I. L. R., 27 M. 143.

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Injunction granted by the decree of the first Court is dissolved by the decree of the appellate Court dismissing the suit and is not revived by the order of the High Court in second appeal remanding the suit to the appellate Court for fresh disposal.

The period during which there was no injunction restraining a suit could not be deducted even though the decree cancelling the injunction was set aside by the appellate Court.

Where a patta contained a term extending the period for the payment of rent by two months beyond the expiry of the fusli and no objection was made thereto by the tenant.

Held, that limitation would commence to run only from that time and not from the end of the fusli.

Second appeals respectively from the decrees of the District Court of South Arcot in A. S. Nos. 101, and 127, 102 and 128, 100 and 120, 105 and 132, 66 and 134, 85 and 118, 67 and 149, 129, 138, 124, 113 and 202 and 114 of 1912 respectively preferred against the decrees of the Court of the Deputy Collector, Cuddalore Division in Revenue Suits Nos. 107, 115, 64, 130, 148, 59, 25, 117, 163, 94, 33 and 35 of 1911.

C. Padmanabha Iyengar for Appellants.

L. A. Govindaraghava Iyer and *A. Ramachandra Iyer* for Respondent.

The Court delivered the following

Judgment:—These second appeals are from suits for arrears of rent by the Shrotriemdar the plaintiff against his tenants for 8 Faslis (Fasli 1312 to Fasli 1319). The main defence is that the claim up to Fasli 1316 is barred by limitation. As regards Fasli 1317, the plea is that as the arrears were due in February it was not open to the plaintiff to stipulate in the patta that they shall be paid at the end of April and as the suit was brought on the 1st of May 1911 the claim for that Fasli also is barred by limitation. There is a further defence applicable to all the Faslis that the plaintiff agreed to forego his claim for water cess in case the Government collected it from the defendant; and as the defendant paid it to Government, he is not liable to pay it over again to the plaintiff.

The plaintiff in answer to the plea of limitation sets up two answers: (1) There were proceedings to ascertain the arrears of rent which terminated only in April 1910, and that those proceedings saved the bar: (2) that the plaintiff was prevented by injunction from collecting the rent; and if the time during which the injunction was in force were excluded the plaintiffs'

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suit will be in time. In order to understand these arguments, the history of the previous litigation has to be shortly stated.

The defendant, the tenant instituted an interpleader suit (O. S. No. 38 of 1904 in the District Munsif's Court of Panruti) to which he made the plaintiff and the Government parties, for determining which of them was entitled to collect the water cess from him. He also prayed for an injunction restraining the plaintiff from collecting it from him till the rights of the rival claimants were settled. The District Munsif held that the Government alone was entitled to collect the cess and restrained the plaintiff by injunction from collecting it. This was on the 5th May 1906. On appeal Mr. Hamnett the District Judge held that the suit was bad for misjoinder of parties and of causes of action and dismissed the suit on the 3rd Nov. 1906. On the 22nd October 1909, the High Court in Second Appeal reversed this decision and remanded the suit for disposal on the merits. After remand, Mr. Moberly the then District Judge held that both the Government and the plaintiff were entitled to collect the cess. This was on the 4th April 1910. Finally, the High Court held on the 18th October 1912, that the plaintiff alone was entitled to collect it. It may be mentioned in passing that the plaintiff instituted the suit on the 1st May 1911 on the strength of the judgment of the District Judge on remand.

The first question for our consideration is whether the litigation ending with the judgment of the District Judge in April 1910 is a "suit or proceeding for the purpose of ascertaining the rent" under Art. 8, Para A of the Schedule to the Madras Estates Land Act. Prior to the Act, claims of this nature were governed by Art. 110 of the general Limitation Act. It was in consequence of the decision of the Judicial Committee of the Privy Council in *Rangayya Appa Rao* v. *Bobba Sriramulu* [1] that the article in the Madras Estates Land Act was inserted. A large part of the claim in the suit arose before the Madras Estates Land Act became Law. On a careful consideration of the grounds of the decision in *Rangayya Appa Rao* v. *Bobba Sriramulu*[1] we are unable to hold that the previous litigation related to the ascertainment of rent. Before their Lordships of the Privy Council, it was argued that as under S. 14 of the Act, rent

1. (1903) I. L. R. 27 M. 143. s. c. 14 M. L. J. 1 (P.C.)

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remaining unpaid at the end of the year became an arrear of rent, it must be deemed to have been ascertained at the end of the Fasli year. The answer of their Lordships is "In their Lordships' opinion this whole series of sections (referring to sections 14 and onwards) applies to ascertained rents, not to rents at rates which have yet to be determined." It is clear from this language that in the opinion of their Lordships it is only when the rate had to be determined under Ss. 7 to 10 and there are proceedings in that behalf that rent remains unascertained. Mr. L. A. Govindaraghava Aiyar argued that when the right to the cess is in dispute between rival claimants, the amount of rent is not an ascertained sum. If this argument is accepted, whenever the rent is claimed by two members of the same family in opposition to each other and although the question may arise incidentally or by two rival landholders each claiming the right in himself, the period of limitation will not commence until their dispute is finally adjudicated upon. We think this would be straining the language too far. Their Lordships observe "The object of a Limitation Act is presumably to compel people who have actionable claims to sue upon them with due promptitude or to forfeit the right to do so at all." Therefore pleas of extenuation of the bar of limitation have to be strictly construed. Consequently the only permissible plea must be found within the article itself. In another passage, it is said "under this procedure it seems clear that as long as proceedings are pending before the Collector and, on appeal from him before the Civil Courts, the rate of rent is in suspense, for no one can say what it will prove to be, and that therefore no arrear of rent can be said to have become due within the meaning of the Limitation Act." Thus in the opinion of their Lordships, the rate of rent must be in suspense, and there must be proceedings to settle it. In this case, there has never been any dispute regarding the rate of rent: and there were no proceedings to ascertain that rate. In the article under reference, the cause of auction is made to commence "from the date of the decree or order by which the rent is finally ascertained." In this case, there has been no such decree or order; and we are therefore constrained to hold that this plea will not avail the plaintiff. The decisions to which our attention has been drawn do not directly

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relate to the point we have to determine. It was pressed on us by the vakil for the appellant that as the interpleader suit was in a Civil Court, even if it related to the ascertainment of rent it will not save limitation. We cannot agree with this contention. It is settled law that the ordinary jurisdiction of the Civil Courts is not taken away in regard to claims for rent except in so far as there is a special exclusion contained in any enactment. This was laid down in *Ramayyar* v. *Vedachella* [1], Vide also *Vedachala Gramani* v. *Boomiappa Mudaliar* [2] and *Kidambi Venkatachariar* v. *Lakshmi Doss* [3]. Therefore if there is a claim to settle the rate of rent pending in a Civil Court, the time taken up by its prosecution will count in favour of the landlord. The observations of the learned Chief Justice in *Syed Gulam Gouse Sha Sahib* v. *Shunmugam Pillai* [4] were relied on for the position that proceedings in Civil Courts are outside the scope of the article in the Limitation Act. There is no foundation for such a conclusion from that judgment. The only question before his Lordship in that case was whether certain revenue proceedings saved limitation and the judgment deals with that question alone. The conclusion arrived at by the learned Judges in *Singaram Pillai* v. *Syed Gulam Gouse Sha Sahib* [5] on appeal from *Syed Gulam Ghouse Sha Sahib* v. *Shanmugam Pillai* [4] shows that the question of starting the cause of action from the termination of proceedings in Civil Courts was not in issue in that case. In *Arunachallam Chettiar* v. *Kadir Rowther* [6] there was no question regarding proceedings in Court.

The decision in *Upendra Nath Nag Chowdhury* v. *Surya Kanta Roy Chowdhury* [7], distinguishes the Privy Council case on the ground that an alternative claim for rent could have been added in. Whether this view is consistent with the answer given by their Lordships of the Judicial Committee at p. 152, to the second objection raised by the counsel for the respondent is doubtful. The decision may be correct with reference to the Special Rent Law obtaining in Bengal. On the whole, our

1. (1890) I. L. R. 14 M. 441
2. (1903) I. L. R. 27 M. 65.
3. (1907) I. L. R. 31 M. 62.
4. (1910) I. L. R. 34 M. 438.
5. (1912) I. L. R. 36 M. 438.
6. (1906) I. L. R. 29 M. 556.
7. (1913) 20 I. C. 205.

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conclusion is that the litigation relied upon was not a suit or proceeding to ascertain the rent.

Mr. L. A. Govindaraghava Aiyar, the learned Vakil for the respondent argued that S. 15 of the Limitation Act saved the bar of limitation. The injunction was issued as stated by us already, on the 5th May 1906. It was withdrawn by the decree of the appellate Court on the 3rd of November 1906. The High Court reversed this decision on the 22nd October 1909. The learned Vakil contended that on this latter date, the order of the District Munsif was revived and that the injunction must be deemed to have been in force between the date of the District Munsif's decree and that of the order of the High Court. In the first place, the order of remand by the High Court is not tantamount to the issue of an injunction. In the second place, there was nothing to prevent the plaintiff from suing between May 1906 and October 1909. He cannot claim to exclude in his favour the time during which no injunction was in force against him. The case of *Gulam Nasirud-din* v. *Mardeo Prasad* [1], is only authority for the position that where a portion of the decree is stayed by injunction, the exclusion operates in favour of the entire decree. We therefore hold that S. 15 of the Limitation Act is not available to the respondent.

As regards Fasli 1317, we find that when the patta was tendered giving the tenant the privilege of paying the kist two months after it became due, he raised no objection to that term in the patta. It is also in evidence that similar terms were contained in the earlier pattahs. It is clear that there was a contract between the parties that the rent should be claimed only at the end of April. The claim for Fasli 1317 is not barred by limitation.

Only the patta for Fasli 1314 stipulates not to claim from the defendant the water-cess in case he is obliged to pay it to Government. There is no such undertaking in the other pattahs; nor is any claim made for the water-cess of Fasli 1314 in the suit. We cannot uphold the contention of the defendants that the plaintiff is precluded from recovering water-cess because he paid it to Government.

1. (1912) I. L. R. 34 A. 436.

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In the result, we dismiss with costs second appeals Nos. 529,531,533,534,538,539 and 988 of 1913. As regards second appeals Nos. 530,532,535,536 and 854 of 1913, the decree will be modified by dismissing the suit as regards the claim up to Fasli 1316 (inclusive) and the decree will stand as regards the rest of the claim and proportionate costs will be allowed to both parties in this and the Lower Appellate Court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[FULL BECNH.]

Present :—Sir Charles Arnold White Kt, Chief Justice Mr. Justice Miller and Mr. Justice Sadasiva Aiyar.

Munisami Mudaly ... *Appellant* 2nd Defendant)*

v.

Abbu Reddy and others ... *Respondents (Plaintiffs and Defendants Nos. 1 and 3 to 7.)*

Munisami Mudaly v. Abbu Reddy.

Civil Procedure Code, Order 41, R. 22—Memo of cross objections—Against a co-respondent,

Under O. 41, R. 22, Civil Procedure Code a respondent can claim relief solely against a co-respondent by way of memorandum of cross objections.

Jadunandan Prasad Singh v. *Koer Kolyan Singh* (1) dissented from.

White, C. J.

Appeal from the decree of the District Court of Chingleput in O. S. No. I7 of 1907.

The case came on for hearing in the first instance before Sir Charles Arnold White Kt. Chief Justice and Mr. Justice Bakewell on the 18th November 1912.

When they made the following

ORDER OF REFERENCE TO A FULL BENCH :—

The Chief Justice :—In this case the plaintiff sued on a mortgage. The 2nd defendant pleaded failure of consideration to the extent of Rs. 700. The 7th defendant impeached the mortgage altogether on the ground of fraud. The District Judge held the mortgage was good, that there had been no partial failure of consideration, and gave the plaintiff a decree for the amount of his claim. The 2nd defendant appealed. The 7th defendant did not appeal but put in a memorandum of objections

1. (1913) 15 C. L. J. 61 at 63.

* A. 40 of 1909. 20th January 1913.

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in which he asked for a declaration that the mortgage was fraudulent and not binding on him.

As regards the appeal of the 2nd defendant I think the District Judge was right for the reasons stated in the judgment of my learned brother, which I have had the advantage of reading. I think his appeal should be dismissed with costs.

Objection was taken to the memorandum of objections on the ground that the 7th defendant, not having appealed, could not in the appeal by his co-defendant, the 2nd defendant, against the decree on the ground that there had been a partial failure of consideration, obtain relief by way of memorandum of objections on the ground that the mortgage was bad *in toto*. The further point was taken that, if it was open to the 7th defendant to put in a memorandum of objections, he could only do so on payment of the proper court fee.

The objection which has been taken raises the question :— can a respondent proceed by way of memorandum of objections against a party to the appeal other than the appellant.

In Calcutta the decisions under section 561 of the Civil Procedure Code of 1882 are to the effect that the procedure by way of cross objections can, as a general rule, only be adopted where the cross objections are raised as against the appellant. See *Bishnu Churn Roy Chowdhry* v. *Jogendra Nath Roy* [1]. A different view has been taken by this Court. In *Kulaikada Pillai* v. *Visvanatha Pillai* [2] Subramania Aiyar J. observed (p. 235) : " According to the decisions of this Court [a memorandum of objections] may legally be filed even where the question arises between co-respondents only."

The wording of Order XLI, Rule 22 differs from that of the section which it reproduces in certain respects. The word "cross-objection" is used instead of " objection." The words " the party who may be affected by such objection " are used instead of the word (1) " appellant." The word "cross objection" seems appropriate as regards a question between the appellant and a respondent; inappropriate, as regards a question between two co-respondents.

1. I.L R. 26 C. 114.   2. I. L. R. 28 M. 229.

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On the other hand the substitution of the words "the party who may be affected by such objections" for the word "appellant" would seem to indicate that the legislature intended to bring questions between co-respondents within the scope of the rule.

The point raises an important question of practice, and it seems desirable to have an authoritative decision in the matter.

I would refer to a Full Bench the question, whether under the Civil Procedure Code of 1908 and the Rules, a party to an appeal can claim relief against a co-respondent by way of memorandum of cross objections.

Bakewell J.:—This is a suit by the assignee of a mortgage for sale of the mortgaged property, in which the 2nd defendant (appellant) one of the mortgagors, has pleaded that Rs. 700, part of the mortgage monies, were not paid by the original mortgagee; and the 7th defendant (7th respondent) who attached the land in execution of a decree against one of the defendants, has pleaded that the whole mortgage is void as against him. The District Judge decided both these points in favour of the plaintiff, and the 2nd defendant has presented this appeal against his decree, and the 7th defendant has presented a memorandum of cross objections by which he seeks to reverse the finding against his plea. The decree is the usual mortgage decree for sale.

Upon the question of fact raised by the appellant, I am of opinion that the evidence supports the finding of the lower Court. The mortgage, Exhibit C, shows that part of the consideration was the settlement of certain debts of the mortgagor, and Exhibits Q, Q1 and E, produced by the mortgagee, show that monies were due by the 2nd defendant to one Ratna Mudali; and Exhibit E bears an endorsement by the latter acknowledging the receipt of money from the mortgagee. There is no evidence that this endorsement is not genuine, and it is supported by the accounts, Exhibits H and J (1), and the contemporaneous statement on behalf of the mortgagee in Exhibit G (1). Exhibit N contains a distinct admission of the mortgage for the full amount by the 2nd defendant, which is confirmed by his statement in Exhibit O and by the fact that for a period of 10 years no claim appears to have been made by him

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for the balance of the loan. The whole case of the 2nd defendant rests upon his day-book, Exhibit I (a), since the ledger, Exhibit II (a), is quite unreliable, and Exhibit III merely shows an intention to discharge a mortgage of Ratna Mudali. These documents only go to show that 3 years prior to the mortgage, Exhibit C, certain monies had been paid by the sale of land of the 2nd defendant in respect of a mortgage to Ratna Mudali, and do not contradict the plaintiff's evidence above referred to.

With respect to the memorandum of objections, a preliminary point has been raised that the 7th defendant should have come to this Court by way of appeal, and that it is not open to him under cover of an appeal by another party upon different grounds to attack a decree in favour of his co-respondent.

(2) It is well settled that a Court will not ordinarily give relief to a defendant in a suit and will not travel beyond the limits of the plaint, and it seems to me that the same general principle should ordinarily be applied to appeals, to which the same rules apply as in suits (see Civil Procedure Code, section 107, clause 2) 3. An appellate court has now full power to do justice between the parties, although they may not have filed any appeal or objections (Order XLI, Rule 33), and therefore, if it thinks fit to reverse or vary a decree, it may make any order necessary to protect the interests of all parties.

The question, therefore, appears to me to be one not of the jurisdiction of the Court, but of practice, that is, as to the manner in which a party aggrieved by a decree should ordinarily place his case before the appellate Court, and whether the legislature intended by Order XLI, Rule 22 to provide that in addition to his remedy by memorandum of appeal, which is the method prescribed by Order XLI, Rule 1, a respondent should have a further remedy by memorandum of cross-objections.

I think the wording of Order XLI, Rule 22 shows that the legislature intended to define the position of a respondent as against the appellant and to make it clear that he can avail himself of any defence or attack in order to meet the appellant's

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case; thus, he can not only change front and refute his arguments in the lower Court, this is the 1st part of the rule, but can also deliver a counter-attack by bringing into debate a matter which the appellant has not included in his appeal. I think that the legislature had in view the case where a party has for reasons of expediency not thought fit to appeal but has been forced into court and wishes to avail himself of all his means of offence and defence. Hence a memorandum of objections is in effect a cross appeal, and notice must be given not only to the appellant but to all parties affected, sub-rule (3), and the former cannot defeat the attack by withdrawing from his appeal, sub-rule (4). I am unable to conjecture what object the legislature may have had, upon the 7th respondent's construction of this rule, in giving a respondent two separate remedies, one by a regular appeal and one contingent upon another party appealing on a totally different matter.

Turning now to the authorities, it has been held in a long series of decisions of the Calcutta High Court under section 561 of the Civil Procedure Code of 1882, that as a general rule the right of a respondent to urge cross objections should be limited to his urging them against the appellant (See *Bishnu Churn Roy Chowdhry* v. *Jogendra Nath Roy* [1],) and by this Court, that that section did not contemplate such a limitation (*Timmaya* v. *Lakshmana*, [2] and See *Kulaikada Pillai* v. *Visvanatha Pillai* [3] *per* Subramania Aiyar J.) Since the date of those decisions and presumably in view thereof, the legislature has amended the rule by the introduction of the word "cross" before objections; and I am of opinion that the intention was to adopt the construction of the Calcutta High Court. A respondent cannot now take objection generally to a decree; but only "cross-objections," that is, objection to the appellant's case. In *re Cavander's Trusts* [4] Jessel M. R. points out that an appeal on a point which does not affect the original appellant cannot be a cross appeal, and a respondent who desires to bring forward a case with which the appellant has nothing to do must give a notice of appeal. I agree with the learned Chief Justice that the question stated by him should be referred to a Full Bench.

1. I. L.R. 26 C. 114
2. I. L. R. 7 M. 215
3. I. L. R. 28 M. 229, at 235.
4. 16 Ch. D. 270.

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This appeal and the memorandum of objections filed by the Respondent came on for hearing in pursuance of the above Order of Reference.

D. V. Nilamega Chariar, Vakil for the Appellant.

V. Narasimha Aiyangar for *T. Rangachariar.*

E. Doraiswami Aiyar for T.R. Venkatrama Sastriar, Vakils for the Respondent.

S. Subramania Aiyar Vakil for the 7th Respondent.

The Court expressed the following

Opinion :—It seems to us that the answer to the question which has been referred to us should be in the affirmative.

This is in accordance with the practice which appears to have prevailed in this Court under S. 561 of the Code of 1882 and we do not read O. XLI, R. 22 as indicating that the framers of the rules intended to make it clear that the practice should be otherwise.

With all respect to the learned Judges who dealt with the question, in *Jadunandan Prosad Singh* v. *Koer Kalyan Singh* [1] a case which was decided under O. XLI, R. 22 it seems to us more convenient to follow a fixed rule than to decide the question with reference to the particular facts of the case in which the question is raised.

We answer the question in the affirmative.

The memorandum of objections after the expression of the opinion of Full Bench came on for final hearing before Mr. Justice Bakewell and Mr. Justice Kumarasami Sastri on the 5th November 1914.

The court delivered the following.

Judgment :—We are both of opinion that the question of consideration has been already decided in proceedings, to which the 7th Respondent was a party : and in which he had the

1. (1912) 16 C. L. J. 61 at 68.

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opportunity of arguing the point : and that this question is *res judicata* and cannot be re-opened upon the hearing of the memorandum of cross-objections. There is no evidence of fraud on the part of the mortgagee, or that the transferees of the mortgagee from him had notice of any fraud.

The memorandum of objections is dismissed with costs. The time for redemption will be three months from this day.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Oldfield and Mr. Justice Tyabji.

S. P. Abraham Servai ... *Petitioner (Defendant)*

v.

Raphial Muthirian ... *Respondent (Plaintiff)*.

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Contract Act, S. 43—Liability to contribute—Creditor's claim against one barred—Not affected by.

The fact that the right of the promisee to sue one of the joint promisors is barred and the creditor's suit against him was dismissed does not affect the liability of the latter to contribute when the other promisor against whom the claim had been kept alive is compelled to pay more than his share.

Petition under S. 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the District Munsif of Srirangam in S. C. S. No. 623 of 1912.

The case came on before Mr. Justice Sadasiva Aiyer in the first instance on the 20th February 1914.

The Court made the following

Order:—Defendant is the Petitioner in revision. The facts seem to be as follows. The plaintiff and the defendant jointly executed a pronote in June 1903 to one Neelamega Sastri. That pro-note would have been barred in the year 1911 against both the plaintiff and the defendant, but plaintiff seems to have, by acknowledgments or similar acts, kept alive the remedy as against himself till 1911. Neelamega Sastri's sons brought Small Cause Suit No. 539 of 1911 in the Subordinate Judge's court of Trichinopoly against both the plaintiff and the defendant for the recovery of the sum due under the pro-note. As the defendant had not joined in any act of the plaintiff which kept the remedy alive as against the plaintiff the suit was dismissed

* C. R. P. No. 834 of 1912. 13th November 1914.

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against the present defendant with costs, while it was decreed against the plaintiff with costs in favour of Neelamega Sastri's Sons.

The plaintiff paid the full amount of the decree on 9th March 1912 to the decree-holders. He then brought this suit at once for contribution in the District Munsif's court of Srirangam on its Small Cause side. The defendant among other defences pleaded that he is not legally liable to make any contribution. The grounds for this contention may be formulated thus.

Though the plaintiff and the defendant were jointly liable under the pro-note of 1903 to Neelamega Sastri, the defendant became exonerated after the expiry of the 3 year's period of limitation and plaintiff remained solely liable under the pro-note. The joint and several liability of the plaintiff and the defendant created under the pro-note became a separate liability of the plaintiff alone who chose to keep the pro-note alive as against him. Any payment made by the plaintiff after the defendant became exonerated from liability was made to discharge that sole and several liability of the plaintiff and hence the defendant cannot be called upon to contribute towards such payment. Further, the decree in the Small Cause Suit No 539 of 1911 which exonerated the defendant, made the plaintiff alone liable, destroyed the joint obligation created by the pro-note on both the plaintiff and the defendant and created in its stead an obligation in the plaintiff alone to pay the decree amount under the decree which put an end to the original contractual obligation. This substituted obligation under the decree was imposed on the plaintiff alone and he discharged that obligation. He discharged it for his own benefit and not for the benefit of the plaintiff and the defendant jointly and hence the plaintiff has no cause of action against the defendant for contribution. The District Munsif, however did not accept the defendant's plea based on the above arguments and relying on *Marrivada Chinna Ramayya* v. *Veerapurani Venkatappaiah*, [1] decreed the plaintiff's suit. Hence this Civil Revision Petition by the defendant (Petitioner).

1. (1910) M. W. N. 839.

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In that case in 1910 (M. W. N.) the first decree had been passed against the plaintiffs of the second suit and a few of the defendants of the second suit, though all the defendants of the second suit were jointly liable with the plaintiff for the rent to the Zamindar Decree-holder, the Zamindar having chosen not to sue the other defendants of the second suit. The plaintiffs paid the whole decree amount and brought a suit for contribution against the defendants including the defendants who had not been made parties by the Zamindar to his suit for rent. The defendants who had not been so made parties to the 1st suit raised the contention that they were not liable because ***at the time of payment of the decree amount*** by the plaintiffs to the Zamindar (decree holder) the Zamindar's claim to recover anything from the said defendants had become barred. The Subordinate Judge on his Small Cause side did not accept this contention and decreed contribution against these defendants A revision petition was presented to the High Court and Mr. Justice Abdhur Rahim dismissed it with the following observations.

"It is not disputed that the case is governed by Art. 6 (evidently a mistake for 61) of the Limitation Act and that Article provides that time begins to run from the date of payment by the plaintiffs. The plaintiff's cause of action against the defendants is not the same as that of the landlord. The former's cause of action is based on the grounds of equity which would come into operation only if and when the plaintiff were compelled to discharge and in fact actuall discharged not only their proper share of the liability but also the liability of the defendants to the common grantor (See *Tirupati Raju* v. *Rajagopala Krishna Raju* [1]. *Torab Alikhan* v. *Nibruttan Lal* [2], Halsbury's Laws of England Vol. VII p. 471 and Pomery's Equity Jurisprudence Vol. VI Ss. 915 to 917. But it is urged that it is hard or at all events anomalous that the right of the land-lord should be barred and the plaintiffs should yet recover the amount for which the defendants were primarily liable to the former. But I do not see any hardship or even anomaly in the position. The nature of the defendant's obligation to the plaintiffs is different from that of their obligation to the landlord and it does not follow that be-

1. (1898) 8 M. L. J. 271. 2. (1886) I. L. R. 13 C. 155.

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cause the defendants might have a valid defence against the latter that the same defence should be available to them against the former (See Pomery's Equity Jurisprudence Vol. VI S. 919). In the case *Tirupati Raju* v. *Rajagopala Krishna Raju* [1], the Original creditor's remedy, *if sought to be enforced at the date of the institution of the suit for contribution* would also have been barred, but in spite of that fact it was held that the suit of the plaintiff in that case was not barred."

It will be seen that in that case though the debt would have been barred if the land-lord had brought a suit against the contesting defendants *on the date of the insitution of the suit for contribution* his suit would evidently have been not barred against those particular defendants if he had made them party defendants along with the plaintiffs *when he brought the suit for rent.* But in this case the remedy of the holders of the pro-note had become barred against the defendant even on the date on which the *decree holders brought their suit on the promissory note.*

Again the Limitation Act uses expressly the word " contribution " only in articles 99, 100 and 107 which refer to a suit for contribution by a party who has paid the whole or more than the amount due under a joint decree or by a sharer in a joint estate who had paid the whole or more than his share of the amount of the revenue due by himself and his co-sharers and to a suit by a co-trustee to enforce against the estate of the deceased trustee a claim for contribution and a suit by the manager of a joint estate of an undivided family for contribution in respect of a payment made by him on account of the estate. As regards other suits in the nature of suits for contribution it was evidently held by Abdhur Rahim J in the above Madras Weekly Notes case that they fell under the general article 61 which relates to money payable to the plaintiff for money paid for the defendant. Can it be said that the plainitff paid the money for the defendant when he paid it only to discharge an obligation created by a decree against the plaintiff alone a decree which further exonerated the defendant.

Again, I am not quite sure that article 61 is the article applicable to such cases. The obligation to contri-

1. (1898) 8 M. L. J. 271.

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bute as between joint promisors is created by S. 43 of the Contract Act. The second paragraph of that section says "each of two or more joint promisors may compell every other promisor to contribute equally with himself to the performance of the promise unless a contrary intention appears from the contract."

I am inclined to think that an implied contract to make such contribution was imposed by statute as between joint promisors and a suit for contribution might fall under the general article 115 which relates to a suit for conpensation for a breach of any contract express or implied not specially provided for.

If one of several promisors who keeps alive the obligation as against himself by acknowledgments or part payments in his own writing or payments towards interest, can claim contribution against his other joint promisors against whom the common creditor had lost his remedy by the bar of limitation, this might give rise to collusive or colourable ackowledgments and payments by one of the promisors. S. 44 of the Contract Act is as follows :—" Where two or more persons have made a joint promise a release of one of such joint promisors by the promissee does not discharge the other joint promisor or joint promisors; *neither does it free the joint promisor so released from responsibility to the other joint promisor or joint promisor.*

This section refers only to an act of release by the joint cerditor. But supposing that by mere omission to sue some of the joint promisors the right of the promissee to sue those joint promisors is barred, can this be treated as a release by the decree holder of those promisors? On the other hand it might be fairly argued that the fact that the creditor's remedy by way of suit is barred does not put an end to the debt or liability. It has been held that except the case provided for by section 28 of the Limitation Act (that is the case where the title to the property itself is extinguished when the right to bring a suit for possession of those properties becomes barred), the right of a creditor to the money due to him by the debtor is not extinguished though he cannot, as plaintiff, successfully sue for its recovery in a British Indian Court owing to the Statute of Limitation.

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The question whether when a creditor sues some of his joint debtors' and gets a decree against them he could again sue the other joint debtors and get a decree against them also within the period of limitation or whether his suit is not barred by S. 43 (present O. 3, R. 9) may also have some bearing on the question now in dispute.

There is another complication in this case a complication which I have already referred to, namely that the creditor brought his suit against both the present plaintiff and the present defendant and did not content himself with suing the plaintiff alone. His suit so brought was expressly dismissed as against the present defendant while it was decreed against the present plaintiff. Can it be said after such an express dismissal that the creditor's right was not extinguished as against the defendant and that only his remedy by a suit was held to be barred. The joint obligation of the promissors might by fiction of law be held to subsist among all the joint promissors notwithstanding the release by the promissee of some of the joint promissors in order to keep alive the equitable remedy for contribution when the promisors are not released or obliged to pay the whole to the promissee; but can this fiction be extended to cases (*a*) where the remedy against some of the joint promissors had become barred by limitation even on the date when the promissee got his decree against the other promissors and (*b*) even in a case where the promissee's suit against some of the promissors was expressly dismissed, costs payable to them though on the ground of limitation.

As my mind is not free from doubt as to the proper decision to be passed in this case I shall direct that the case be posted before a division bench for further hearing and disposal.

C. Madhavan Nair for Petitioner.

M. O. Parthasarathi Iyengar and *K. S. Ganesa Iyer* for Respondent.

The Court delivered the following

Judments: *Oldfied J*:—The plaintiff and the defendant in this case were joint executants of a promissory note. It is common ground that each received part of the sum borrowed and the correctness of the Lower Court's finding as to its division between them and the amount repaid by each cannot

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be disputed. They were however sued by their creditor for the balance due; and a decree was passed against the plaintiff for the whole, the defendant being exonerated on his plea of limitation. The plaintiff satisfied the decree and sues the defendant for contribution. The Lower Court held that, notwithstanding the defendant's exoneration, it was equitable that he should contribute towards the discharge of the common debt. This Civil Revison Petition has been argued against that decision. It has been referred to a Bench by a learned Judge sitting in the Admission Court.

As pointed out by the learned Judge, the facts in *Ramayya* v. *Veerapurani Venkatappiah* [1] on which the Lower Court relied, differed materially from those now in question, because in it there was no decision on limitation or any other ground, such as there is here, against any of the defendants, and some had not been sued by the creditor. The principle there recognised is merely that liability for contribution between co-contractors is enforceable, although the suit to enforce it is brought after a suit on the original liability would be barred. Here the point is that the original liability was held unenforceable against the defendant not only before the present suit was brought, but also before the plaintiff was, held liable or made any payment.

The argument, apart from authority, has been presented as follows. The defendant has been exonerated; and the debt must have been kept alive against the plaintiff by some act on his part, for which it is not suggested that the defendant is responsible. Whether the plaintiff is regarded as the defendant's joint contractor, or as he contends that he should be, as his surety in respect of the amount which he has had to pay on the defendant's behalf, is immaterial, because he could not affect the defendant's position in either capacity. The debt having been held unrecoverable from the defendant directly, it is unjust that it should be recovered from him indirectly in consequence of the plaintiff's conduct, which he did not authorise. This treats the defendant's liability as originating in or at least as depending on the fact that a decree preceded the plaintiff's payment. But on the other side it is

1. (1910) M. W. N. 839.

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contended that it should be placed on a broader basis with reference to an earlier stage in the transaction, the separate contract between the parties, when the debt was incurred, to indemnify each other for any excess payment made by one for the other, which was independent of the creditor's suit and its result. We have to decide which of these views is correct.

There is, so far as we have been shown, no direct Indian authority. But *Subrahmania Aiyar* v. *Gopala Aiyar*[1] is relied on by the plaintiff though one portion of the Judgment certainly supports the defendant. It is therefore necessary to ascertain what was really decided in it. The plaintiff, a trustee sued the sons of his predecessor in the trusteeship for damages on account of their father's misfeasance. The limitation applicable was that, which would have been applicable to a suit against him *Periasami Mudaliar* v. *Sitarama Chetty*[2]. The suit against them was therefore barred. The plaintiff also however sued certain sureties, against whom (so far as the report shows) the suit was still in time, solely because they had given land as security. It was held that they had not been discharged by the fact that the remedy against their principal had been lost, since his liability, and therefore theirs, to plaintiff were still subsisting. That is intelligible. But the question there was between the creditor and his debtors, principal and surety directly, whereas here it is only between the latter: and the case therefore gives no support to this part of the plaintiff's argument. He relies here in fact on an identification of the defendant's liability to the creditor, which no doubt is unaffected by the latter's loss of his remedy, with his distinct liability to the plaintiff, which has not been shown to be legitimate and is irreconcilable with other cases he has cited. The relation between the sureties and their principal debtor is in fact dealt with in *Subramania Aiyar* v. *Gopala Aiyar*[1] only *obiter* in the words at page 311. "It has been urged that the surety will be prejudiced, if he is liable to be sued, when he cannot have any remedy against the debtor, after a suit against him has become barred. The answer is he is himself to blame. He can easily avoid the risk and clothe himself with all the creditor's rights by payment

1. (1909) I. L. R. 33 M. 308. 2. (1903) I. L. R. 27 M. 243.

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or performance as soon as the debtor becomes liable. S. 140 of the Indian Contract Act." This no doubt, supports the view for which the defendant contends. The question however was not before the learned Judges directly, and the authorities relevant to it were not referred to; and, if the hardship involved and the means of avoiding it are to be considered it may respectfully be suggested that there is no more reason for penalising the surety for not paying and for failure to acquire the right to sue the principal debtor, than the debtor, for not paying what he primarily was bound to pay.

The other cases are *Woolmer Shansen* v. *Gulick* [1] and *Gardner* v. *Brooke* [2]. They are directly relevant and are in the plaintiff's favour. In the the first, question arose between co-sureties and is dealt with very shortly. The Court inclined to the belief that the statute did not begin to run, until the plaintiff made his payment, but was not obliged for the purpose of the case to decide between that date and the date on which the amount of his liability was ascertained. That point however was placed beyond doubt as regard this presidency by *Narayana murthi* v. *Marimuthu Pillai* [3] and is not left open in the second case above mentioned, in which the discussion is full and the parties, like those before us, were joint makers of a promissory note. The reasons for the decision in the plaintiff's favour were that the defendant's liability rested on grounds of equity, independent of the original contract with the creditor, and was based on the payment made in discharge of the common obligation and had no existence, till that payment was made. These decisions are directly in point and in the circumstances must be followed in preference to the *obiter dictum* above referred to though it occurs in a Judgment of this Court. In accordance with them the conclusion must be in the plaintiff's favour. The Civil Revision Petition is therefore dismissed with costs.

Tyabji J:—The question before us is, where a joint promisor, whose liability to the promisee was kept alive beyond three years from the date of the promissory note, and who was consequently compelled to pay by a decree of the court more

(1) (1898) II Ch, D. 611. 2. (1897) II Ir. R. 6,
3. (1902) I.L.R. 26 M. 322.

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than his proportion of the debt to the promisee, can sue another joint promisor for contribution though the decree exonerated that other joint promisor from payment, on the ground that the debt as against him was barred by limitation.

The facts are as follows:—

The plaintiff and the defendant executed a joint promissory note on 25th June 1903. In or before January 1905 the defendant sent Rs. 20 to the plaintiff for part payment to the promisee and the plaintiff paid this sum together with Rs. 58 on his own account. Subsequently the promisee sued both the plaintiff and the defendant for the balance still due. A decree was passed on 5th August 1911 in which the whole balance was ordered to be paid by the present plaintiff and the present defendant was exonerated from all payment, the suit on the promissory note having become barred at the time as against the present defendant. On the 9th March 1912, the plaintiff paid the whole of the amount decreed and in the same year sued for contribution from the defendant. His suit was allowed by the District Munsif. This petition raised the question whether the District Munsif was right.

Being a suit for contribution between joint promisors (there being no express contract for indemnity between the joint promisors) the case must be governed by sections 42-44 of the Indian Contract Act, the effect of which for the present purpose may be stated as follows. Where two or more persons have made a joint promise, in the absence of a contract to the contrary,

(1) as between the joint promisors and the promisee,

(*a*) all the joint promisors must fulfil the promise (section 42):

(*b*) the promisee may compel any one to perform the whole promise (S. 43).

(*c*) a release by the promisee of one joint promisor does not discharge the other or others (S. 44, first part).

(2) As amongst the joint promisors themselves, each joint promisor may compel every other joint promisor to contribute equally with himself to the performance of the promise (S. 43

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paragraph 2). Three incidents connected with the right of contribution are expressly laid down: (*a*) if any one joint promisor makes default in contributing, the other must bear the loss (S. 43, paragraph 3).

(*b*) S. 43 does not derogate from the rights of a surety to recover from his principal payments made on behalf of the principal, and

(*c*) the release of a joint promisor by the promisee does not free the joint promisor so released from responsibility to the other joint promisor or joint promisors (S. 44, second part).

The right to contribution (as between joint promisors) is referred to in the part of the Act directly applicable as a right to compel contribution *to the performance of the promise*."

This may at first sight appear to make the liability to contribute, co-incident with the performance of the promise. But the duty to contribute is clearly distinct from the duty to pay to the promisee: the right of each joint promisor to claim indemnity does not consist merely of being subrogated to the right of the original promisee: for though the promisee's rights may have been released the responsibility to the joint promisor is not annulled (S. 44). Following therefore the wording of the Act it may be stated that the right of each joint promisor to compel every other joint promisor to contribute equally with himself to the performance of the promise, is unaffected by the mode in which the promisee exercises or fails to exercise his rights (*a*) to compel all the joint promisors to fulfil the promise (S. 42) or (*b*) to compel anyone of them to do so (S. 43) or (*c*) to release one, without discharging the other (S. 44). An express release by the *promisee* cannot (on principle even apart from S. 44) affect the right of a third person (the joint promisor) the direct liability on the joint promise may thus be expressly annulled, without affecting the collateral liability. It is difficult then to conceive how the promisee's mere omission annulled, without affecting the period—an omission which does not destroy even his own right, but merely bars his remedy by suit *Subramania Aiyar* v. *Gopala Aiyar* [1],—can affect the joint promisor's collateral right.

1. (1910) I. L. R. 33 M. 308.

Abraham Servai v. Raphial Muthirian.

Tyabji, J.

It seems to me therefore that the District Munsif was right.

The result at which I have arrived agrees with the view of a strong court of appeal in Ireland in *Gardner* v. *Brooke* [1] upholding the concurrent decisions of Brain C. J. and the Division Court. In that case the right of contribution from a joint promisor was thus referred to: the right comes in equity originally and absolutely by the payment in discharge of a common burthen and has no existence whatever, inchoate, or complete, till the payment is made. It is not therefore affected by what affects the contract........... The principle came into England from the Civil Law where it pursues exactly the same consequences and distinctions that are found in equity all based on community of burthen and benefit from payment, and more from agreement." In the same case Gibson J. said "contribution is not limited to cases of guarantee, but extends to all cases where one is compelled to pay more than his proportion of a joint liability: *Ramskil* v. *Edwards* [2]. The question here is what is the extent of the obligation of the joint makers to one another. Is it an unqualified liability, according to the proportionate shares of each, to indemnify any joint maker who may at any time be legally compelled to pay more than his share? or does the duty depend on the co-debtor, who has paid in excess of his share, being merely subrogated into the creditor's rights?, or does the obligation only bind a party so long as he himself remains liable to the creditor, and therefore may himself require the benefit of indemnity against the others? The first view is, I think, plainly the true one. When they signed the note, the parties must have contemplated that it would be paid, and that the burden should be shared equally. The fact that one happens to escape from legal liability to the creditor, without the consent of his associates, and perhaps even without their knowledge, cannot be allowed to disturb the original obligation, between the co-debtors, or to alter the proportions of liability or contribution, which must be ascertained from the note at the time that it was made. The duty to contribute here binds all, so long as any one remains legally liable by virtue of the joint contract."

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1. (1897) 2 Ir. Rep. 6,12. 2. 31 Ch. D, 100.

Abraham Servai v. Raphial Muthirian.

Tyabji, J.

The facts of the case last cited are exactly similar to those now before us except in two particulars, (1) there the payments in respect of which contribution was brought was not made in execution of a decree; (2) there was no decree exonerating the defendant from liability on the contract.

The first of these particulars does not distinguish the case in favour of the defendant.

With reference to the second, the defendant before us contends that by being exonerated from payment in the previous suit he is exonerated from the duty to contribute. But the decree gave effect to the direct liability arising from the contract as between the promisee and the joint promisors in so far as that liability could be enforced by suit. It did not affect the collateral liability as between the joint promisors themselves arising not from the contract which was the cause of action in the first suit, but from the payment consequent on the decree.

Another argument addressed to us was that the acts of the plaintiff, keeping the debt alive against himself after the promissory note became barred as against the defendant, made in effect a new contract between the plaintiff and the promisee, that the defendant was not privy as a joint promisor to this new contract. Such may conceivably be the case were a joint promisor against whom the debt is barred pays the debt; a payment so made may conceivably be taken as a payment not on account of any legal liability, but made out of honour; and a person making such a payment cannot in honour ask another to contribute to the maintenance of his honour, where under such circumstances an attempt is made to compel contribution. Mr. Justice Sadasiva Iyer's fears (expressed in his referring judgment) that the first payment might in fact have been made in collusion with the promisee might be well founded. But in the present case there is no suspicion of collusion and no basis for saying that a new contract for payment was made between the plaintiff and the promisee. The final payment was made because there was a decree against the plaintiff and it would appear that at least one of the earlier payments which kept the debt alive was made on behalf of the defendant.

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It seems to me therefore that alike on the construction of the section, on principle, and on authority, the plaintiff ought to succeed in the suit.

Before concluding I must refer to two decisions of this Court. *In Putti Narayanamurthi Aiyar* v. *Marimuthu Pillai* [1], S. 145 of the Indian Contract Act was referred to as though it directly governed a joint promisor's right of contribution. It seems to me that though the joint promisor's right is analagous to the surety's right of indemnity under. S. 145, there are distinctions between the two. The right of indemnity referred to in S. 145 and the connected S. 126-131, 133-147 inheres in a person who contracts with the promisee himself expressly and solely as surety : in such a case the right to indemnity is implied. Sec. 145. Next there is the case of a person who is a principal joint promisor as between himself and the promisee, but as between himself and another, the joint promisor is (expressly or impliedly) only a surety; the promisee not being privy to the contract of the suretyship between the promisors *inter se* S. 132. Thirdly there is the case of an express contract of indemnity (S. 124) as distinct from a promise to indemnify implied by S. 145 in a contract of guarantee. All these rights and liabilities are analogous to the one with which we have to deal. But if and in so far as the direct rules contained in Ss. 42-44 are not a sufficient guide, resort should be had, it seems to me in the first instance to S. 124, which refers to the rights under an express contract to indemnify similar to that which S. 43 implies amongst joint promisors: rather than to S. 145 which refers to a contract for indemnity implied between a person who, contracts expressly and solely as a surety on the one hand and the principle debtor on the other hand in order to make S. 145 applicable to joint promisors the contractual liability of each joint promisor as principal debtor must be assumed to have reference only to a proportionate part of the debt, an assumption that is opposed to S. 42.

The next case is *Subramania Aiyar* v. *Gopala Aiyar* [2], which has been already referred to. The question there before the court was whether a surety's liability to the creditor (as defined in

1. (1902) I. L. R. 26 M. 323 2. (1910) I. L. R. 33 M. 308.

Abraham Servai v. Raphial Muthirian.

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S. 126) was discharged by the fact that the creditors suit against the principal debtor was barred by limitation. That question was answered in the negative. The ground for decision was that though the surety's liability continues only so long as there is no act or omission of the creditor, the legal consequence of which is the discharge of the principal debtor " yet it could not be said that the legal consequence of the creditor's forbearance to sue the principal debtor during the period of limitation and the consequent loss of his remedy was a discharge of the principal debtor. In dealing with an objection to the result of this reasoning, it seems to have been assumed by the Court that the surety's rights against the principal debtor had become barred at the time of the decision, *i.e.*, before the surety had made any payments. It is unnecessary to consider whether this assumption was consistent with the terms of S. 145 of the Indian Contract Act, and with the ruling in *Putti Narayana Murthi Aiyar* v. *Marimuthu Pillai*[1] where it was held that the cause of action under S. 145 does not arise until actual payment by the security. See also *Marrivade Chinna Ramayya* v. *Veerapurani Venkatappiah* [2], *Wool Merchansen* v. *Gullick* [3]. For the remark in *Subrahmaniya Aiyar's case* based on the assumption just referred to was purely *obiter* dealing not with the rights of the creditor against the surety which were being adjudicated upon, but dealing with the remedy of the surety which might or might not have been barred as against the principal debtor. The circumstances alluded to on p. 304 of the report, and the fact that some property was given as security seems to have brought about the result that the creditor's remedy was barred against the principal debtor, but enforceable against the property given as security. It seems to me that it would be going beyond all the limits of the doctrine of *stare decisis* to consider ourselves bound by an assumption as to a question, which is not before the Court an assumption made merely for the purpose of dealing with an argument that was not accepted.

I agree that the petition should be dismissed with costs.

[*End of Volume XXVII*].

1. (1902) I. L. R. 26 M. 322. 2. (1910) M. W. N. 889. 3. (1893) 2 Ch. D. 514, 529.

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Abatement of Suit—*Suit for possession—Hindu Law—Will alleged to be invalid as property—Death of minor plaintiff—Effect of.*

Where a minor had sued for the recovery of certain property on the ground that the property was joint family property and as such the will by his father by which he had constituted the 1st defendant trustee for the plaintiff absolutely in the event of the plaintiff attaining majority, in default for certain charity, was invalid but died soon after.

Held that the cause of action did not abate and the suit could be continued by the representatives of the plaintiff.

Narayana Reddi v. *Kamakshi Ammal* (*Oldfield and Tyabji JJ.*) .. 674

Administrator General's Act (Act II of 1874, S. 20.)—*Letters of administration taken—Powers under—Vesting—Probate and Administration Act, ss. 4,90, 149—Alienation by Administrator General—Court's sanction if necessary—Transfer by her—Transfer by Administrator General wih notice of—Priority of.*

All the property whether immoveable or moveable belonging to the estate of a deceased Hindu dying intestate in respect of which the Administrator-General takes out letters of administration vests in him. Unlike the ordinary administrator, he may dispose of any portion of it without the sanction of the Court.

Administration cannot be treated as closed until every act necessary for its completion is done and a sale made by the Administrator-General of a portion of the estate to realise his commission takes precedence over an earlier transfer effected by the heir whether the Administrator General has notice of such transfer or not.

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Where it was found that the Ejaman of an Aliyasantana family being in possession of funds belonging to the family and a large net income unaccounted for executed a mortgage for the full amount of debt due from the family and it further appeared that in the course of seven or eight years he had twice set up unfounded claims to properties which were found to be family properties and alienated some of them, taking these facts along with the advanced age of the Ejaman and other circumstances though in themselves insufficient to prove dishonesty or incompetence, their Lordships held that though the case was one on the border line, the decree of the Lower Court deposing the Ejaman was right and should not be interfered with.

Thammakka v. *Akku* 3 I.L.R. 4 M. 481 referred to

The income from family lands is equally family property and it is the duty of the Ejaman, though he may not be liable to render accounts, to devote it to the discharge or reduction of the family debt or to show generally that it was utilised for family purposes.

The presumption of law is that money in the hands of the Ejaman of an Aliyasantana family is family property.

The limitation applicable to a suit brought by the junior members of an Aliyasantana family to recover properties alienated by the Ejaman as property belonging exclusively to himself is art. 144 and not art. 91; the application of the latter article being confined to cases where a person seeks to set aside an alienation effected by himself or by some person acting on his behalf.

The authorities are to the effect that even if the Ejaman purported to act for the family the article applicable is art. 144.

Unni v. *Kunchi Ammal* I. L. R. 14 M. 26 and *Anantan* v. *Sankaran*, I.L.R. 14 M. 101 applied *Swadiveloo Pillai* v. *Ponnammal* I.L. 12 M.W.N. 383 distinguished.

Chingacham Vetil Sankaran Nair v. *Chenga Gopal Menon*, I.L.R. 308 *Ganapathi Aiyar* v. *Swamalai Goundan* I.L.R. 36 M. 575 referred to.

Kunhanna v. *Timmaju* (*Sir Charles Arnold White C.J. and Seshagiri Aiyar, J.*) 60

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Where an award was questioned both on the ground of corruption and irregularity of procedure, the latter consisting in not making proper inquiry as to the matters in dispute and keeping adequate notes of the proceedings.

Held, that if, irregularities in procedure could be proved which would amount to no proper hearing of the matters in dispute, there would be misconduct sufficient to vitiate the award without any imputation on the honesty or impartiality of the arbitrator but that the burden of proving them was on the party that alleged the existence of such irregularities and that in the present case the burden had not been discharged.

That though it is generally desirable that an arbitrator should make and retain for subsequent use if necessary, notes of the proceedings before him, the absence of such notes is not a ground for setting aside an award at the instance of a party who was summoned to appear and must be held to have known the general course of procedure did not make any protest until after the making of the award with the terms of which she was not satisfied.

Held also, when a matter has been considered by the arbitrator and a decision given it cannot be questioned unless the charge of corruption or misconduct is established but where he decides a matter which is clearly outside his power the whole award would be bad unless that portion of the award is separable from the rest.

It is well recognised law that when a separable portion of the award is bad, the remainder of the award if good can be maintained.

Held further, the limitations applicable to the evidence of an arbitrator as a witness in a legal proceeding to enforce his award are stated in the case of *Buccleuch* v. *The Metropolitan Board of Works* (1872) L.R. 5 H C. 418), but where charges of dishonesty are made any relevant evidence which he can give is properly admissible provided that evidence admitted as relevant on a charge of dishonesty or partiality is not used for a different purpose *viz.* to scrutinize the decision of the arbitrator on matters within his jurisdiction and on which his decision is final.

That a charge of corruption if made should be put fairly and squarely to the arbitrator so as to enable him to give a direct answer or explanation.

That the charge of corruption or partiality was not made out. The method and amount of valuation and materials for such valuation adopted by the arbitrator were matters within his discretion and in the absence of proof that he was influenced by any corrupt motive, the mere fact that in every matter, his decision was in favour of one of the parties was not sufficient to support a charge of corruption.

Buccleuh v. *The Metropolitan Board of Works* (L. R. 5 H. L. 418, explained.

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Assignment—*Mortgage—Voidable on the ground of fraud or undue influence—Payment by mortgagor after notice from assignor asking not to pay—Validity of—Effect of decree setting aside assignment.*

Though a decree setting aside an assigument on the ground that it was brought about by fraud or undue influence may have the effect as between the assignor and assignee of cancelling it from the date of the assignment itself, it has not the same effect as against parties who are bound to treat the assignment as valid and binding till it is actually set aside.

Accordingly, where the plaintiff (a mortgagee, assigned his rights under the mortgago and gave notice of the assignment to the defendant his debtor but subsequently asked him not to pay to the assignee alleging that his assignment was procured by undue influence. *Held* that so long as the assignment was not set aside, the debtor was entitled as well as bound to treat the assignment as valid and any payment made by him to the assignee before the date of the decree actually setting aside the assignment was binding against the plaintiff.

Rajah of Ramnad v. *Arunachallam Chettiar*, 24 M.L. J. 5 92; *Trimbak Bikaji* v. *Shankar Sham Rao*, I. L. R. 36 B. 37 foll. *Gopalakrishna Iyer* v. *Gopalakrishna Iyer*, I. L. R. 38 M. 123. distinguished.

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Award—*Construction—"No right to demand accounts"—Division "of cash"—Claim for share of profits under usufructuary mortgage, excluded—Equitable set-off—Amount made payable under award—Plaintiff's claim for share of joint income—Set-off.*

Where in an award by which the plaintiffs and defendants who were members of an undivided family became divided it was stated that the parties had put in written statements saying that they divided the cash, &c., that they had understood the accounts among themselves and that they had no right to demand accounts from one another, in a suit by the plaintiffs for their share of the receipts under a certain usufructuary mortgage by some of the defendants previously to the award alleging that the award had omitted to deal with them.

Held, that the term cash clearly referred to those receipts that in any event the stipulation in the award, *viz.*, that "no co-sharer had any right to demand accounts" covered the claim and excluded it.

The arbitrator had found certain sums due to the defendants and had declared that they should be paid out of the joint income.

Held that the defendants were entitled to an equitable set-off in respect of the said amounts against the plaintiffs claim for their share of the joint income.

Thakur Sheo Narain Singh v. *Thakur Bisunath Singh* (*Mr. Ameer Ali P.-C.*) 128

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Bengal Land Revenue Sales Act (XI) of 1859—*Indian Limitation Act of 1877, Art. 121—Proceedings before revenue officers—Evidence—Thakbust proceedings—Evidentiary value of—Practice—Comment—Findings of fact.*

In a suit by a purchaser at a Revenue sale held under the provisions of Act XI of 1859 for recovery of possession, it was contended that the lands in question did not form part of the mahal purchased and even if it did, the right of the defaulterto the property had been extinguished by adverse possession and therefore no claim could be made to it by the purchaser.

Held on the first question that there was a concurrent finding of fact and in accordance with the established rule of the Board, their Lordships could not interfere unless it was shown that that finding was clearly wrong.

Allen v. *Quebec Warehouse Co.*, (12 A.C 101) followed.

Held on the second question that a sale under Act XI of 1859 conveyed title free from all incumbrances, right acquired by adverse possession was only an incumbrance and as such limitation began to run against the purchaser only from the date his sale was completed and the suit being within twelve years of that date, was not barred.

Where in proceedings taken before the Thakbust Deputy Collector in reference to disputes between neighbouring land—owners' boundaries were fixed of the mouzas belonging to each, and in accordance with the thak then prepared, settlement also was subsequently made.

Held, that the proceedings were in truth determinations by public officials of the matters in dispute, all the parties interested being given the opportunity of making their claim, raising their objections and producing their evidence and though the parties to them were not estopped by the decisions arrived at as they would be in regular proceedings in courts of law, these determainations were of high authority and when acquiesced in by all the parties interested for a length of time and made the basis of of important transactions, should not be disturbed unless upon the clearest proof that they were erroneous.

Maharaja Surja Achrjiya Bahadur v. Sarat Chandra Roy Chowdhuri. (*Lord Atkinson*). 365

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Boundaries Act (Act XXVIII of 1860), S. 25—*Survey and Boundary Marks Act (Act IV of 1897)—Order under—Finality of—Not only to order but also to grounds of—Res judicata—C. P. C., S. 11—Principles of—Universed application—Issue need not be formally raised—Substantially in issue.*

In a suit by the plaintiff to recover certain lands which she alleged formed part of the mitta purchased by her and had been wron ully taken

Boundaries Act—(*Contd.*) PAGE.

possession of by the Government and in the alternative for the return of the peishcush paid by her proportionate to the portion in the possession of the Government it appeared that in 1880 the boundaries of the mitta had been delineated under the Boundaries Act XXVIII of 1860 "when the Boundary Settlement Officer found that the lands in question had never formed part of the mitta and had excluded them accordingly from the limits of the mitta and the said order of the settlement officer had become final, no suit having been brought to set it aside within 1 year as required by S. 25.

Held, that both the decision of the Settlement Officer that the lands did not form part of the mitta purchased by the plaintiff and the ground of the decision *viz.*, that it never formed part of the mitta were *res judicata* and barred the suit.

Per Seshagiri Aiyar, J. The general principles enunciated by S. 11, C. P. C. are of universal application. The plea of *res judicata* or estoppal is avaliable not only as regards the final conclusion of the Court or officer but also regarding all findings necessary for arriving at that conclusion whether they are given on formal issues raised in the case or are referable to the points which must have been the basis of the final determination *Kama Raju* v. *The Secretary of State for India* (I. L.R. 11 M. 309 F. B.) followed.

Muthammal v. *Secretary of State for India.* (*The Offg. Chief Justice, Ayling and Seshagiri Aiyar JJ.*) *F. B.* 529

Buddhist Law—*Inheritance—Father or sister—Daughters living apart from father and trading on their own account—Policy of the British Government in recognising the Native Laws—Dhammathats—Dhamma—Their authority—Manu Kyay.*

Where three sisters had lived apart from their father and carried on trade on their own account and acquired property on the death of two of those sisters, dispute arose between the father and the surviving sister on the question of succession to the property of the deceased:

Held, after an exhaustive review of all authorities on the Buddhist Law, on the authority of later Dhammathats and of Manu Kyay which was complied in the 18th century during the reign of Alompra and issued under the Royal Command in 1756 that the sister was to be preferred to the father under the circumstances to inherit the entire property left by the deceased females.

Held further that it was more in accord with the genius and practice of the extension of the British rule and of the incorporation of various races and populations within the British Empire to accept the native laws in their main elements in so far as they contained a working system of jurisprudence which was in accord with the traditions and habits of the people.

Held also that a decision to be an authority must decide clearly and broadly the point at issue in a subsequent litigation.

Burge's Colonial and Foreign Law, Prof. Focet-Hammer's Treatise on the sources and Development of Burmese Law. MO Gaung's Digest of the Burmese Buddhist Law referred to

Buddhist Law—(*Contd.*) PAGE.

The cases of *Mi San Hla Me* (1893-1900 P. J. 116). *Maung Chit Kywe* (1895 L. C. 388) *Mah Gun Bo* (1898) 11 B. R. 66. *Mah E Dock* (1898) 11 W. B. R. 109 *and Maung Shwe Bo* (1893-1900) P. J. 524 *distinguished.*

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Caste—*Acquisition of rights by—Prescription—Customary right and right by prescription distinguished—Legal origin presumption of, from long user-Suit to establish right to use a path on behalf of a caste —Maintainability of*

Where a right has been enjoyed time out of mind, a legal origin if possible will be presumed for such right. If the right claimed is with reference to a defined locality, then it is a customary right. But where the right is claimed on behalf of individuals or bodies politic or corporations then the right is said to be acquired by prescription. A caste is for this purpose recognised as a corporation; it is not necessary that all the members of the caste should have been exercising the right, it is sufficient if the persons who did exercise the right claimed to do so on behalf of the caste. The right claimed in such a case must be distinguished from a public right which is vested in the general public and in respect of which a suit cannot be maintained in the absence of special damage.

Held accordingly, where a suit was brought by certain plaintiffs named on behalf of themselves and their caste, to establish their right to use a certain pathway and it was found that members of the caste had been using it from time out of mind.

That the caste had acquired a valid right by prescription and the suit as framed was sustainable.

Suppan Asari v. *Vannia Konar*. (*Sankaran Nair and Ayling. JJ.*) 110

Charter Act, S. 15—Cr.P. Cl. S. 439—*Power of superintendence—Madras City Municipalities Act (Act III of 1904) S. 413—Rules framed by Local Government—Rule 5—Order by Presidency Magistrate; declaring inclusion as candidate illegal—No power to revise.*

Charter Act—(*Contd.*) PAGE.

The High Court has no power to revise an order passed by the Presidency Magistrate under Rule 5 of the rules framed by the Local Government in pursuance of the powers given to them by S. 41 of Act III of 1901 declaring the inclusion of any person as a candidate for municipal election illegal.

Vijiaraghava Pillai in re (*Ayling and Seshagiri Aiyar JJ.*) ... 227

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There is no provision of law enabling the Court to dismiss a suit on account of the death of the next friend of the minor plaintiff. An order dismissing the suit under those circumstances is a nullity and notwithstanding the order, the suit must be regarded as pending.

Neither S. 10 nor S. 11 C. P. C. precludes the institution of a fresh suit for the same relief; they only bar the trial.

In cases coming within S. 10, the proper procedure is to stay the suit and not to dismiss it.

A party is not precluded from contending that an order is a nullity from the mere fact that he unsuccessfully applied to have it set aside.

To a certain extent, S. 151 C. P. C. introduces into this country the principles underlying the Vexatious Actions Act (59, and 60 Vict. C. 51.

Venkateswara Aiyar v *Cherasseri Madathil Ravanunni Nair* (*Seshagiri Iyer J.*) 405

——— **S. 13**—*Foreign judgment—Failure to answer interrogatories—Defence struck off—Judgment given—Not on the merits—No action lies upon—Court of competent jurisdiction—Judgment of English Court against non-resident Indian subject—Jurisdiction conferred by Imperial Statute.*

Where the defendant having failed to answer interrogatories his defence was struck off and judgment was given against him in an English Court.

Held, that the judgment was not one on the merits and action would not lie on it.

Quaere, if judgment of the English Court against a non-resident British Indian subject is not, one by a court of competent jurisdiction with in the meaning of S. 13 C. P.C. by reason of the fact that an Imperial statute conferrs jurisdiction to try actions against non-resident foreigners.

C. P. C.—(*Contd.*) PAGE.

Mazzin Hossein v. *Raphael Robinson* (I. L. R. 28 C. 641) referred to.

Visvana'ntaha Reddi v. *Keymer* (*The Chief Justice and Seshagiri Aiyar J.*) ... ... 670.

————**Ss. 13 and 44**—*Jurisdiction—Foreign judgment—Decree of Cochin Court—Transfer for execution—Competency of executing Court to question jurisdiction—O. 21, R. 7—Effect of alteration in the language—"May execute"—Discretion—Equivalent to "shall"—Submission to jurisdiction—Mere denial of—Voluntary, notwithstanding.*

Where a decree of a Court in the Cochin State was transferred for execution to a Court in South Malabar.

Held, that it was competent to the latter Court to refuse to execute the decree on the ground that it was passed without jurisdiction.

Judgments of Courts in Native States are foreign judgments within the meaning of S. 13 and are enforceable whether by suit or by execution only subject to the limitations contained in that section.

The words "as if they had been passed in British India" in S. 44 relate only to the mode of execution and have not the effect of giving foreign judgments coming within that section all the incidents of the judgment of a British Court.

Per Seshagiri Aiyar J: (*agreeing with Sundara Aiyar, J.*) *Semble*: Holders of decrees of Courts in Native States coming within Government notification under S. 44, have both the remedy by suit and by execution open to them.

Quaere: If even in the case of decrees of British Indian Courts transferred for execution, jurisdiction of the Court passing the decree may not be questioned by the executing court. The alteration in the language of S. 225 (O. 21, R. 7) has not made any difference in the matter. *Sadasiva Aiyar, J. Contra*).

Obiter. The use of the word "may" in S. 44 by itself may not have given the Court power to refuse execution on the ground of want of jurisdiction.

Per Sadasiva Aiyar J: The word "may" in S. 44 Civil Procedure Code, is equivalent to "shall" and the Court has no discretion to refuse execution on the ground of want of jurisdiction in the Court which passed the decree.

Per Sundara Aiyar J. In executing decrees of foreign Courts, the Court has a discretion to allow or not to allow execution.

Where the following facts appeared *viz.*, that the plaintiff in May 1908, obtained an interim injunction from the Cochin Court restraining the defendant (a non-resident British subject) from disposing of certain property belonging to him in the Cochin State and that in the following July, the latter filed a counter-petition for the removal of the injunction and the same day also filed a written statement denying jurisdiction but raising also a defence on the merits.

Held that the lower appellate Court committed no error in law in coming to the conclusion that under the circumstances there was no

C. P. C.—(*Contd.*) PAGE.

voluntary submission by the defendant to the jurisdiction of the Cochin Court.

Obiter : The decision in *Parry and Co.* v. *Appasami* (I. L. R. 2 M. 407) that it is enough merely to object to the jurisdiction to make the submission inuoluntary is probably no longer law.

Veeraraghava Aiyar v. *Maga Seit* (*The Officiating Chief Justice, Ayling and Seshagiri Aiyar J*) (*F.B.*) 535

———*Ss. 22, 23, 151—No application where suit instituted in High Court—Stay of suit—Grounds of—Abuse of process of Court—Test.*

Ss. 22 and 23 Civil Procedure Code do not apply when the suit ought to be transferred is one instituted on the Original Side of the High Court but the court has inherent jurisdiction to stay the suit on the ground that the process of the court is being abused if it finds that the suit is instituted not *bona fide* for the purpose of obtaining justice but for the purpose of harassing or annoying the defendant or obtaining something to which the plaintiff is not legitimately entitled or the expense or difficulties of the trial in the place where the suit is instituted are so great that it would be practically impossible for the applicant to get justice. *Egbert* v. *Short* (1907) II Ch, 205 *Norton* v. *Norton* (1908) I. Ch. 471 *Logan* v. *Bank of England* (1906) I. K. B. 141 referred to.

Where, however, the cause of action arose wholly within the jurisdiction of the Original Side of the High Court (the suit being in respect of an alleged libel published in Madras).

Held that the mere fact that both the plaintiff and the defendants were residents of Punjab was not a ground for staying the suit.

Hindustan Assurance and Mutual Benefit Society Ltd. Rail Mulraj (*Sir Arnold White C.J. Tyabji J.*) 645

———**S 44** May execute—Whether bound to execute—Construction of Statutes 535

———**Ss. 48, 153**—*Court of Wards—Estate under management of—No transfer of decrees—Exclusion of time—Power to amend—Defence of limitation taken away—Effect on—Limitation Act—Provisions as to exclusion of time, &c.—Applicability of, to period of 12 years under C. P. C., S. 48—Time during which execution was stayed by injunction—Exclusion of.*

In reckoning limitation for the execution of a decree, against the holder of an estate, the time during which the estate was under the management of the Court of Wards cannot be deducted where it has not been accompanied by a transfer of the decree to the Collector.

Per *Wallis J:* Except under very special circumstances the Court should not allow amendments when they prejudice the rights of the opposite party as existing at the date of such amendments.

Weldon v. *Neal* 19 Q.B.D. 394, followed. *Sevugan Chetty* v. *Krishna Iyengar* 22 M.L.J. 139, *Varadiah* v. *Raja Kumara Venkata Perumal* 26 M.L.J. 83 not foll.

Where, accordingly, the Court was asked to treat an application to attach and sell certain properties filed after 12 years from the date of the decree as a petition to amend an earlier application to attach other

C. P. C.—(*Contd.*) PAGE.

properties which was in time. *Held*, that the prayer could not be granted as it would deprive the other side of the defence of limitation.

Per *Sadasiva Aiyar, J.* (*contra*): Having regard to S. 153 of the Civil Procedure Code, Courts have full power to amend the pleadings at any stage so as to advance substantial justice irrespective of whether the other side is or is not deprived of his right to raise technical defences.

In the circumstances of the case, having regard to the fact, that the decreeholder was guilty of great negligence in prosecuting his claim, his Lordship declined to grant the prayer for amendment.

Held further : Per *Sadasiva Aiyar, J*: The Civil Procedure Code, is not a special statute but being the general law of procedure passed in the same year as the Limitation Act, the sections of the latter Act relating to exclusion of time (here it was time during which execution was stayed by injunction) govern also the 12 years, period of limitation provided for in S. 48 C. P. C.

Dicta in *Raman* v. *Babu Reddi* 24 M.L.J. 96 dissented from.

Kumara Venkata Perumal v. *Velayuda Reddi*. (*Wallis & Sadasiva Aiyar JJ*) 25

———**S. 92**—*Practice—Order 1, r. 10—Alienees of trust properties—If necessary or proper parties—No relief can be granted against—Judgment—Evidence against if party.*

Per curiam. In suits under S. 92 of the Civil Procedure Code no relief can be had against alienees of trust properties.

Per Offg. Justice.—Though an order adding them parties might if they so desire, be properly made, they ought not to be made parties against their will.

Per Seshagiri Aiyar, J.—Though no relief can be had against them they are proper, if not necessary parties to the suit. Assuming that the judgment would not operate as *res judicata* (a point on which His Lorpship expressed no opinion), it would be strong evidence against the alienees in the subseqent suit for the recovery of the property.

Raghavalu Chetty v. *Pellati Sitamma.* (*Sir John Wallis Offg. C. J. and Seshagiri Aiyar, J.*) 266

———**S. 96 Cl. (2)**—*Decree passed with consent—Meaning of—Decree passed in accordance with compromise notwithstanding objection—Agreement to withdraw suit on defendant executing sale deed—Decree directing execution—Competence of Court to pass—O. 23, r. 3—Relates to suit—Meaning of.*

The prohibition contained in S. 96, cl. (2) related only to decree passed with the consent of parties and cannot be held to extend to decrees passed in accordance with a compromise notwithstanding the objection of one of the parties.

Where the plaintiff agreed to withdraw a suit on the defendant agreeing to execute a sale deed to the plaintiff.

Held, that the decree could be passed compelling the defendant to execute the sale deed.

All terms which form the consideration for the adjustment of the matters in dispute whether they form the subject matter of the suit or not

C. P. C.—(*Contd.*) PAGE.

become "related to the suit" within the meaning of O. 23, r. 3 and can be embodied in the decree.

Natesan Chetti v: *Vengu Nachiar* I.L.R. 33 M. 102 *Gobind Chandra Pal* v. *Dwakanath Pal* I.L.R. 35 Cal. 387, *followed.*

Ayyagiri Veerasalingam v. *Koovur Basivi Reddi.* (*Sadasiva Aiyar and Tyabji JJ.*) 173

———**S. 145. (N.C.) S. 253 (O.C.)**—*Surety for restitution—Execution against—Proviso inserted long after enactment—Interpretation—Value for—Hindu Law—Decree against father —Not executable against properties allotted to the son, after partition.*

Having regard to S. 253 of the old Code of Civil Procedure, a person who has stood surety for restitution in case the decree is reversed can be proceeded against in execution and the amount realised from him in the same manner as if he were the judgement debtor.

Such an order though it may be executed against the family properties of the surety and his sons when they are in a state of union, cannot be executed against the properties in the hands of the son alloted to him at a *bona fide* partition taking place after the order but before the attachment. The analogy of S. 53 New Code cannot be used to justify such execution..

A proviso inserted long after the enactment of a section can afford little assistance in interpreting the section. Provisos are so often inserted *ex abundanti cautela* that, even when they are inserted at the time of the enactment their value as aids to interpretation is very little.

Thirumalai v. *Ramayyar*1 follwed *Arunachellam* v. *Arunrchallam* 2 dissented from.

Kameswaramma v. *Venkatasubba Rao* (*Sir John Wallis and Oldfield JJ.*). 112

———**S. 148, O. 7, r. 11**—*Application to appeal—Appeal out of time when proper Court fee paid—Discretion to excuse delay—Hindu Law—Self acquisition—Burden of proof—Nucleus, existence of—To be proved.*

S. 148 of the Civil Procedure Code has not the effect of making O. 7, r. 11 applicable to memoranda of appeals so as to make it incumbent on the Court to admit them though out of time when the conditions of that rule are complied with.

Achut Ramachandra v. *Nagappa* (I.L.R. 38 B. 41), dissented from.

It is only when there is ancestral property by means of which other property may have been acquired that the burden is shifted on the party alleging self-racquisition to prove that the property was acquired without any aid from the family estate.

Ramkishan Das v. *Tundamal* (I.L.R, 33 A. 677) followed.

Narayana Rao v. *Venkatakrishna Rao.* (*Officiating Chief Justice and Seshagiri Aiyar J.*) 677

———**S. 151**—*Inherent power to vacate order—Order recording satisfaction—Secured by fraud.*

C. P. C.—(*Contd.*) PAGE.

The Court has inherent power to vacate order recording satisfaction obtained by the gross fraud of the judgment-debtor on the Court.

Vilakathala Raman v. *Vayalil Pachu* (*Oldfield and Napier* JJ.) .. 172

———S. 151—Only introduces principles of Vexatious Actions Act. *See* C. P. Code. Ss. 10,11 ... 405

———, O. 2, R. 2—Suit on a promissory note to a legal practitioner for outfees—Promissory note not filed in Court—Dismissal of suit—Subsequent suit on original cause of action—Maintainability. *See* Legal Practitioner's Act 728

———, O. R, 9 (1)—*Dismissal for default—Gross negligence of next friend—Ground for setting aside.*

Gross negligence of the next friend of a minor plaintiff is a ground entitling the court to set aside an order dismissing a suit for default.

Adyapadi Ramanna Udpa v. *Krishna Udpa* (*Oldfield* J.) ... 167

———, O. 21, R. 7 Change of language—Effect of. *See* C. P. Code. Ss. 13,43 535

———O. 21, R. 46—*Mortgage debt—Mortgage in possession—Actual or constructive—Mode of attachment.*

The proper mode of attaching a mortgage debt is that indicated in O. 21, R. 46; the fact that the mortgagee is in possession actual or constructive of the mortgaged property makes no difference. *Nataraja Aiyar* v. *The South Indian Bank Ltd.* (22 M L.J 105; s.c. I.L.R. 37 M.51) followed.

Chullile Peetikayil Nammad v. *Othenam Nambiar* (*Sir John Wallis and Ayling* JJ.) 289

———O. 21, r. 90—"*Whose interests are affected by the sale*"—*Decree-holder not entitled to rateable distribution—Not within.*

A decree-holder that has not applied for execution and is therefore not entitled to rateable distribution of the proceeds of the sale is not a person whose interests are affected by the sale within the meaning of O. 21, R. 90 and cannot apply to set aside the sale for fraud. The interest referred to in the rule is interest in the property sold. *Jogendranath Chatterjee* v. *Monmothanath Ghose* (17 C.W.N. 80) followed.

Kathiresan Chettiar v. *Ramasami Chettiar* (*Sadasiva Aiyar and Napier* JJ). 302

———O. 23, R. 1 S. 107—*Applies only to pending suits—Jurisdiction—Appellate Court—No power to give leave to withdraw.*

C. P. C., O. XXIII, R. 1 applies only to pending suits and has no reference to appeals or second appeals. The appellate Court has therefore no power to allow a suit to be withdrawn with liberty to file a fresh suit. *Eknath* v. *Ranoji* (I. L. R. 35 B. 261) followed.

Choragudi China Kotayya v. *Raja Varadaraja Appa Row.* (*Oldfield and Napier* JJ.) 244

———O. 23, R. 3—Relates to suit. *See* C. P. Code S. 96 meaning of 176

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———O. 23 R. (1) (2) a & b—*Sufficient ground—Ejusdem generis—C. P. C., S. 115—Material irregularity—Letters Patent—Appeal—S. 15—Order dismissing revision petition.*

Where after a substantial portion of the plaintiff's evidence had been heard, on his affidavit that (1) he could not attend the hearing owing to his brother's death (2) that he wished for the issue of a commission and (3) that he had to get certain measurements made and a plan prepared, the Court gave him permission to withdraw the suit with liberty to sue afresh.

Held that the sufficient ground referred to in O. XXIII, R. 1 (2) (b) must be *ejusdem generis* with the defect referred to in Rule 1 (2) (a) and as the ground on which permission was granted in this case was not such a ground, the Court's action was one without jurisdiction.

That even otherwise in the circumstance of the case, the Court acted with material irregularity in granting the permission. *Bai Kashi bai* v. *Shidapa Annappa* (I. L. R. 37 B. 682) followed.

An appeal lies under the Letters Patent from an order of a single Judge of the High Court dismissing a revision petition filed against an order giving leave to withdraw a suit with liberty to sue again. *Rama Aiyar* v. *Venkatachalla Padayachi* (I. L. R. 30 M. 311) followed.

Aiya Koundan v. *Jagan Mandalathipathiar.* (*Oldfield and Seshagiri Aiyar JJ.*) 480

———O., 23, *R. 2—Compromise—"Relating to the subject matter of the suit"—Suit to set aside a will—Decree for payment to defendant Rs. 2750—Jurisdiction to be tested by reference to plaint and not to reliefs granted—Objection to validity of decree—Not to be taken in execution.*

In a suit to set aside a will as a forgery brought in the Munsiff's Court, a razinama was entered into by which *inter alia* a sum of Rs. 2,750 was made payable by the plaintiff to the defendants and a decree was passed in terms of the Razi but when execution was taken out, the plaintiff objected that the decree ought not to have been passed in terms of the Razi as it did not relate to the subject matter of the suit, (none of the terms dealing with the will), and also that to give a decree for Rs. 2,750 was beyond the pecuniary jurisdiction of the Munsif.

Held that as presumably the plaintiff abandoned his claim as regards the will in consideration of the reliefs awarded to him, all the terms of the Razi could be properly embodied in the decree.

That the pecuniary jurisdiction of the Court to make the decree was to be judged by reference to the plaint and not by reference to the reliefs awarded.

That in any view, neither of those objections was available to the plaintiff as those objections related to the validity of the decree and could not be gone into in execution.

Ratnsawmi Chetty v. *Ratnammal* (*Sankaran Nair Ayling JJ.*) 388

———, O. 41, R. 5—*Order refusing to stay execution—Appeal against—Sustainability of.*

C. P. C.—(*Contd.*) PAGE.

There is no appeal against an order by the appellate Court refusing to stay execution under O. 41, R. 5.

Malamal Vitil Krishnan Nair v. *Kavalappara Moopil Nair* (*Sankaran Nair and Spencer* JJ.) ... 171

———**O. 41, R. 22**—Memorandum of cross-objections can be laid against correspondents. *See* correspondents 140

Company—*Offer of Service—and Sale of patent prior to formation—Minutes of the Company—Proviso—Sale of Shares.*

Where one Rose who had invented a tile called " Perfect tile" offered his services as well as his patent to the provisional directors of the Perfect Pottery Co." which on being duly accepted the offer by a certain minute of Oct. 15th 1905 agreeing to pay Rs. 30,000 for the Patent, Rs. 10,000 paid in and Rs. 20,000 in Shares, with the proviso that absolute property therein should vest in Rose in the fifth year and Rose having died before the expiration of the fourth year the Company refused to allot finally the said shares to Rose's widow.

Held, that the only contract between Rose and the Company was that contained in the minutes of Oct, 15th and that the offer by Rose could be incorporated into the minute only to the extent it was not inconsistent with the minute, and that the clause in the offer enabling the company to cancel and retain shares, which was inconsistent with the minute of the Company by which there was a sale of the Patent for Rs. 30,000/, was of no effect

The Perfect Pottery Company, Ltd. v. *Ida L Rose* (*Lord Parker P.C.*) 74

Concurrent finding—Principle of—Applicability to question—of where there is no evidence in support of a finding. *See* Registration ... 80

———**findings of fact**—If final when no evidence—question of Law. *See* Registration Act 80

Construction of statutes—Civil Procedure Code Act V of 1908, S. 44—May execute. *See* C. P. Code S. 13, 43, ... 535

Contract—*Illegality—Public—Hindu law—Adoption—Promise to pay money for bringing about adoption by promisee's daughter.*

A promise to pay money for bringing about the adoption of the promisor by the daughter of the promissee is against public policy and therefore void,

Kothanda Rama Reddi v. *Thesu Reddiar* (*Sankaran Nair and Spencer* JJ.) 416

Contract Act, S. 43—Contribution—Liability to—Not affected by bar of creditor's claim against one. *See* Contribution ... 746

Contract Act, S. 127—*Guarantee—Consideration—Advances on recommendation—Consideration for promise of guarantee.*

Advances made on the recommendation of a person are not sufficient consideration in law for a subsequent promise by him guaranteeing their payment.

Muthukaruppa Mudali v. *Kathappudayan* (*Sadasiva Aiyar and Napier* JJ.) 249

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Contribution—Liability to—Not effected by creditor's right against one of the debtors being time barred. *See* Contract Act 746

Court Fees Act, S. 7, cl. XI (cc). Suit under, with a Court-fee on one year's rent—Whether Court can go into the question of title. *See* Mortgage 479

Covenant for title, Registered sale deed, whether excluded by notice of defect, Breach. *See* Registration Act 517

Criminal Procedure Code, S. 144—*Renewal of order—No special urgency or necessity—Ultra vires.*

Where an order under S. 144 purported to renew an earlier order passed under that section without any indication that there was any special urgency or necessity to pass such order.

Held that the order was *ultra vires* as in effect it contravened the provisions of cl. (2).

Govinda Chetti v. *Emperor.* (*Sankaran Nair and Ayling JJ*) ... 628

———**S. 145**—*Order for payment of costs—Memorandum of cost filed—Assessment of costs not made by negligence in office—Death of petitioner—Application by son—Delay—No ground for rejecting—Successor's power to make order—Necessity for bringing legal representatives on record.*

Where an order for payment of costs to the petitioner had been duly made by a magistrate in a proceeding under S. 145, Criminal Procedure Code and though the memorandum of costs had been filed and an order made by him to the office to "check and include the costs," owing to some negligence in the office, the costs were not actually taxed and nearly 3 years after the petitioner's son (the petitioner having died in the meanwhile), made an application to the successor of the Magistrate who disposed of the case to assess the costs.

Held that the order could be made by the successor and even though the legal representatives of the deceased had not been brought on the record.

Held further that the delay in applying was not a ground for rejecting the application as it was only a reminder to the Court to do its duty.

The Code of Criminal Procedure contains no special provisions for bringing on record representative of deceased parties. All that the court has to see is that the appeal or application has not abated by the death of one of the parties.

Mahomed Ershed Ali Khan Chowdhury v. *Sarada Prasad Shaha* (I. L. R. 28 Cal. 37) followed, *Bhojal Sonar* v. *Nirbhan Singh* (I. L. R. 21 C. 609) dissented from.

Subbiah Servai v. *Chokalinga Thevan* (*Sadasiva Aiyar and Spencer JJ*) 613

——— **S. 146**—*Order of attachment—Parties found in joint possession—Without jurisdiction.*

The Magistrate has no power to order an attachment under s. 146, Criminal Procedure Code when he finds that both the parties are in joint possession.

Mohammad Koolayappa Rowthan v. Sheik Abdul Khadir Rowthan (*Ayling and Seshagiri Aiyar JJ*). 169

Cr. P. C.—*Contd.* PAGE.

———, S. 147—*Right to enter temple and perform Kumbhabhishekham ceremony—Dispute relating to use of land—Formal record as to likelihood or breach of the peace—Not essential.*

A right to enter a temple and perform the ceremony of Kumbhabhishekam is a dispute relating to the use of land within the meaning of S. 147, Criminal Procedure Code.

Kader Batcha v. *Kader Batcha Rowther* (I.L.R. 29 M, 237) *Muhammad Musalliar* v. *Kunjiche Mussalliar* (I.L.R. 11 M. 323). followed.

S. 147 does not require that the Magistrate should formally record a proceeding that there is in his opinion danger of a breach of the peace.

Miller v. *Rajendra Nath Chowdhry* (2 C.W.N. 670) followed.

Chidambara Gurukal v. *Sengoda Goundan* (*Kumarasami Sastri J.*) 587

———, S. 195—*I. P. C. S. 182, 193—Sanction for offences under, by Sessions Judge—Statement made to Police officer and Sub-Magistrate —Incompetent—Sanction for offences under S. 193—Contradictory statements—Court to be competent to give sanction for both statements.*

Where a Sessions Judge granted sanction for offences under S. 182 I.P.C. for having sent false reports to the Police and the Sub-Magistrate and also for an offence under S. 193 for having made two contradictory statements one of which was made to the Sub-Magistrate in the course of a local inquiry under S. 64 Criminal Procedure Code.

Held, that neither the Police officer nor the Sub-Magistrate being subordinate to the Sessions Judge the sanction was *ultra vires*.

A Court granting sanction under S. 193 in respect of contradictory statements must be competent to grant sanction in respect of each of the statements.

Rami Reddi v. *Public Prosecutor of Kurnool*. (*Ayling and Hannay* JJ.) 586

———S. 215—*Reference to quash commitment charge of murder, grievous hurt, hurt and right—No evidence of murder or grievous hurt—Necessity for further inquiry—No ground for interference.*

Where the accused was committed to the Sessions on a charge of murder, riot, grievous hurt, &c., and a reference was made by the Sessions Judge to the High Court to quash the commitment on the ground that there was no evidence of murder or grievous hurt the only offences triable exclusively by the Sessions Court and if the accused went to trial he would have to be acquitted whereas the case was one for further inquiry.

Held, that they were no reasons for quashing the commitment. *Emperor* v. *Noor Mahomed Suleman* 13 Bom. L. R. 209, followed ; *Empress* v. *Narotam Das* I. L. R. 6 A. 98 dissented from.

The Sessions Judge of Coimbatore In re (*Sankaran Nair* and *Tyabji JJ.*) 593

———S. 248—*Complaint under authority of Municipal Secretary—District Municipalities Act, S. 39 A, S. 280—Municipal Council—Withdrawal by—Ultra vires.*

It is not competent to the Municipal Council to withdraw a complaint instituted by the complainant by virtue of an authorisation by the Municipal

Cr. P. C.—*Contd.* PAGE.

Secretary to whom the power of the Chairman under S. 280 of the District Municipalities Act has been delegated under S. 39 A.

Paramananda Nadar v. *Karunakara Doss (Sankaran Nair and Ayling* JJ.) 37

———**Ss. 250, 1 (2) (b), 45 (c)**,—*Information to the Village Magistrate—Village Magistrate, if Magistrate under the Code.*

A person that gives information to the Village Magistrate of an offence which the latter duly transmits to the Police as required by S. 45 (c) of the Criminal Procedure Code is a person that gives information to the Police within the meaning of S. 250 Cr. P. C. and if the information is found to be false or vexatious, the Court may properly order him to pay compensation. *Sessions Judge of Tinnevelly Division* v. *Sivan Chetty*, I. L. R. 32 M. 258, followed.

Per Seshagiri Aiyar J :—*Quaere*, if the Village Magistrate is not a Magistrate under the Criminal Procedure Code.

Nachimuthu Chetti v. *Muthusami Chetti*, (*Ayling and Seshagiri Aiyar* JJ.) 37

———**Ss. 253, 350, 437**, charge framed by Magistrate—Successor re-commencing enquiry under S. 350—Order of discharge—Amounts to acquittal—Further inquiry—Power to order 589

———**Ss. 422, 250**—*Appeal to joint Magistrate from order of compensation by Sub-Magistrate—Notice to District Magistrate—Absence of—Not ground for interference at the instance of accused.*

The person to whom notice ought to go on an appeal to a joint Magistrate from an order awarding compensation made by a Second Class Magistrate is the District Magistrate but want of such notice is not a ground for setting aside the order passed on appeal at the instance of the accused when no steps are taken for that purpose by the District Magistrate himself.

Guruswami Naiken v. Tirumurthi Chetty. (*Ayling and Hannay* JJ.) 62

———**Ss. 437, 350, proviso (a) and (b)** *S. 253—Charge framed by Magistrate—Successor recommencing inquiry under S. 350—Order of discharge—Acquittal—Further inquiry—Power to order.*

Where after a Magistrate had framed a charge under S. 254 of the Code, he was transferred and his successor recommenced the inquiry under S. 350 and then passed an order of discharge under S. 253 (2). *Held*, that a Magistrate who recommences an inquiry or trial cannot thereby modify its nature and the order must be treated as one of acquittal.

Held also that the District Magistrate who had ordered further inquiry had no power to do so.

The Crown v. *Nathu and others* (1903) 38 P.R. Cr. 35) foll.

Sriramulu v. Veerasalingam (*Ayling Tyabji JJ.*) 589

———**S. 438**—*Conviction for lesser offence—Facts disclosing more serious offence—Court not competent to try—Quashing of—Not called for unless accused prejudiced or sentence inadequate.*

Cr. P. C.—*Contd.* PAGE.

It is not necessary to quash a conviction merely because the facts disclose a more serious offence which the Court is not competent to try unless the accused was prejudiced or the sentence inadequate.

Mohidin Bacha Saheb. In re (*Ayling* J.) 594

Custom—Family custom—Departure in one instance if destroys—Proof. *See* Hindu law, Family ccustom 370

Damages—Measure of—Condition to cultivate in due season—Vara patt. *See* Rent Recovery Act. 415

Declaration—Decree in favour of defendant against third party not binding on plaintiff, suit maintainable. Specific Relief Act' S. 42 *Brutum fulmen*, No ground for refusing *See*. Specifi Relief Act. ... 520

Dedication—*Public charitable trust—Revocation—Validity—Conduct of the settlor.*

Where there has been a complete dedication of properties to public charitable trusts there can be no revocation.

The subsequent conduct of the founder in not giving effect to it will not render the trust nugatory.

Re Shums Trust : *Prichard* v. *Richardson 91 L. T. 192 followed. Pallaya Chetty* v. *Vedachellam Pillai* (1911) 2. M. W. N. 376. *Mahadeva Iyer* v. *Sankarasubramania Iyer* (1911) 2, M. W. N. 382. Ref. to. *Abdul Rajak* v. *Bai Jimhabai* 14 Bom. L. R. 292. followed *Suppammal* v. *Collector of Tanjore* I. L. R. 12 M. 387 distinguished.

Krishnasami Pillai v. *Kothandarama Pillai* (*Seshagiri Aiyar*, and *Kumarasami Sasri* JJ)... ... 582

———**Of property to temple**—Whether appropriation of income of village to the temple amounts to—Dealings with the property. *See* Limitation Act, Arts 142, 144 195

Deed—Construction of—Sale by executor not describing himself as such—Plain interpretation of language used. *See* Hindu Law Bengal School 93

———*Construction—Chit Fund Rules—Payment on furnishing security "to the satisfaction of the proprietors"—Discretion—Capricious or arbitrary exercise—Proof of, essential for Court's interference* ... 44

Where under the rules of a chit fund, the purchaser of any instalment was to draw the money on furnishing security to the satisfaction of the proprietors of the fund.

Held that in the absence of evidence that they acted arbitrarily or capriciously in the exercise of their discretion the Court could not go behind their judgment.

Krishna Iyer v. *Ramasami Iyer* (*Ayling and Napier JJ.*) ... 447

———*Construction—Sale or mortgage—Agreement to reconvey—Antecedent relationship of mortgagor and mortgagee—Shortness of period within which to exercise right to have reconveyance—Value of the property.*

Where in favour of a person who already held mortgages on the property up to its full value and who was about to file a suit upon them, a sale was effected with an agreement to reconvey within 18 months which though entered into on the day in which the sale was arranged was em-

Deed—*Contd.* PAGE.

bodied in a document dated 10 days later and recited that the request for the agreement was made on the day the document was executed.

Held, having regard to all these circumstances, the transaction was a sale and not a mortgage.

Swaminatha Aiyar v. *Appasami Aiyar* (*Wallis, Offg.C.J.* and *Seshagiri Aiyar J.* 686

———**Recital of execution by three**—*Execution by only two—Liability of the executants—Question of fact.*

Where a document recites that it is executed by A, B & C but only A & B execute it, the question whether A & B agreed to be liable only if C also joined is a question of fact to be decided according to the circumstances of each case and cannot be the subject of a second appeal unless there is no evidence to justify the finding of the court below.

Sivaswamy Chetty v. *Sevagan Chetti* I.L.R. 25 M. 389. *Krishnama Chariar* v. *Narasimhachariar* I.L.R. 31 M. 114.

Rangasasami Aiyangar v. *Somasundaram Chettiar* (*Sadasiva Aiyar and Tyabji JJ.* 176

De facto guardian—Alienation by—Limitation Act, Art. 44—Whether applies to. *See* Hindu Law 285

Dhammathats—Dhammas—their authority. *See* Bhuddist Law ... 41

Diluvian—How affects right of several fishery in tidal river. *See* Jalkar... 419

Discovery Section relating to—not to be used for adjudicating rights as against strangers. *See* Presidency Town Insolvency Act 66

Discretion of proprietors, of Chit fund, Interference by Court—Proof of arbitrary exercise, essential for. *See* Deed construction 447

Dissolution of partnership—Suit for—Duty to produce accounts—Amount arrived at without accounts—Refusing an application for discovery—Propriety of. *See* Partnership 192

District Municipalities Act—"*Money-lender*"—*Meaning of—Lending transactions to be numerous, continuous and systematic—Not casual or intermittent—Use for public purposes—Stabling Devasthanam horses and coaches used to carry drums or pilgrims specially honored—Discretion in trustee as to persons to use—Purpose, public notwithstanding.*

Any person who casually or intermittently invests his surplus funds on mortgage or on personal security cannot be considered to follow the calling of a money-lender so as to be chargeable for tax on that footing under the District Municipalities Act; to make him liable, his money-lending transactions must be so numerous, continuous and systematic that his calling might appropriately be called the trade or business of money-lending.

Buildings used for stabling Devasthanam coaches and horses which are employed in carrying drums in temple processions or allowed for the use of respectable pilgrims to whom such honour is shown by the Mahant are exempt from tax as buildings used for public purposes. Such uses are uses for public purposes notwithstanding that the persons who make use of them do not belong indiscriminately to all castes but a discretion is vested in the trustee as to the members of the public to whom the privilege is to be allowed.

District Municipalities Act—*Contd.* PAGE.

Municipal Council of Tirupati v. *Sree Mahant Prayag Dossjee Varu* (*Sadasiva Aiyar* and *Tyabji* JJ). ... 231

Dubash, Position of, Sub-agent : See Agent 501

Easement—*Right to light—Infringement of—Test—Actionable Nuisance—No right to amount of light enjoyed—Limited to quantity required for inhabitancy or business.*

By the enjoyment of light for a period of twenty years, a person does not acquire an indefeasible right to the enjoyment of a like amount of light in the future ; his right is limited to that quantity of light which is required for the ordinary purposes of inhabitancy or business of the tenement ; in other words to constitute an infringement of the right to light, the obstruction complained of must amount to an actionable nuisance.

Colls v. *The Home* and *Colonial Stores, Ld.* (1904 A. C. 179) approved and followed.

Jolly v. *King* (1907 A. C. 1.) explained.

Peter Charles Ernest Paul v. *William Robson.* [*Lord Moulton*] (P.C.) 117

Ejectment, Plea open to defendant, whether defendant can plead that sale to plaintiff was a sham transaction. *See* Vendor and Purchaser ... 445

English Common Law and American Law—Applicability to India. *See* Jalkar 419

Evidence Act, S. 112—*Date of conception—No presumption of, being on 280th day before birth—Hindu Law—Alienation by father—Birth of son within 280 days—Effect of.*

Though there is a conclusive presumption that a child born within 280 days after access has ceased, is legitimate, there is no similar or any presumption that a particular child was conceived on the 280th day before its birth. It is matter for proof in each case when the conception took place and in the absence of evidence as to it, the party relying upon the fact of such conception must fail.

Quære : Whether purchasers for value are bound to inquire whether the wife of the alienor is *enciente.*

Minakshi v. *Veerappa* (I. L. R. 8 M. 89) referred to.

Venkata Subba Raju Garu v. *Gatham Venkatrayudu* (*Wallis Offg C. J. and Hannay* J) 580

Execution sale—Inadequate price—Legal action of the mortgagee decree holder—Cannot be set aside. *See* Trusts Act S. 90 213

Executor—Sale by—Not describing himself as executor—Whether passes merely beneficial interest—*Bona fide* purchaser for value. *See* Hindu Law, Bengal School 92

Family partnership— *Nattukottai Chetti—Usage—Family property and trade assets—No. difference between—Limitation Act, S. 19—Name of the family deity—" Signed "—Acknowledgment by partner—Manager of the family—Mode of discharge—Provision for—Other mode of discharge not excluded.*

From the mere fact that there is an agreement that the debt may be discharged in a particular manner, it cannot be inferred that the creditor has waived all his other remedies.

Family Partnership—*Contd.* PAGE.

In the case of Nattukottai Chetti family trading firms, the entire family property may legitimately be considered as the assets of the firm, no distinction being made in practice between the two.

Having regard to the practice of Nattukottai Chetties not to sign letters in their own name but to use the name of the family deity instead, placing their own name at the top of the letter, the name of the deity may be regarded as the signature of the writer for the purpose of S. 19 of the Limitation Act.

An acknowledgment by a member of a family firm who is also the managing member of the family will bind the firm.

Chidambaram Chetti v. *Ramaswami Chettiar.* (*Sankaran Nair and Spencer JJ.*) 631

Finder—Cooly working under the eye of his employee—No control over the treasure whether a finder under the Treasure Trove Act. *See* Treasure Trove Act. 477

Fishery, Jalkar, change of water course, Right to follow river. *See* Jalkar. 419

Foreign Judgments—Execution in British India—Competency of British Court to question the jurisdiction of foreign Court. *See* C. P C. Ss. 13, 14 535

———Defence struck off for not answering interrogatories—No action lies on—*See* C. P. C. S. 13. 670

Gift as Sridhanam—But provision as property going to descendants—Effect of. *See* Hindu Law 681

Grant—Proof from user—when original grant not found and other secondary evidence not available. *See* Jalkar 419

Guarantee—Advances made on recommendation—Whether constitutes a contract of—*See* Contract Act S. 127 249

Guardian—*Alienation by—Recital of necessity—Not sufficient evidence of—Burden of proof—Mesne profits and interest—Award discretionary—Must bear proportion.*

Recitals of necessity contained in deeds executed by guardians and managers, are not sufficient to establish the facts recited though they are evidence to show that the facts recited were present to the minds of the parties at the time of the alienation and their absence may render it difficult for the alienee to prove that the alienation was supported by necessity.

But, where in addition to recitals of necessity there were these facts, *viz.*, that the guardian who alienated the properties was the natural father of the minor and was on affectionate terms with him, that the existence of a portion of the debt was admitted by the minor after attaining majority, that there was an expensive litigation in respect of the minor's adoption and there were no other funds available to meet the costs of the same, that the creditors who were paid off were persons who had no interest in the present litigation.

Held, that the judgment of the Lower Court holding that under the circumstances the burden was on the ward to show that the alienation was not supported by necessity was right and could not be interfered with in second appeal.

Guardian—*Contd.* PAGE.

Where an alienation by the guardian is set aside and a decree given to the minor for possession with mesne profits on terms of his paying the amount of the consideration found to be binding with interest, the questions as to what should be the proper allotment for mesne profits and what the proper amount of interest to be awarded, are matters of discretion but if, where the alienation set aside is a usufructuary mortgage and the Court awards interest out of all proportion to the mesne profits, the order should be set aside and the interest made to bear some proportion to the mesne profits.

In this case, their Lordships allowed for interest the same proportion of the mesne profits as the consideration upheld bore to the whole.

Krishna Rao alias A. Srinivasa Rao v. *Aiyasami Padayachi* (*Tyabji and Spencer* JJ.) 138

Guardian—Gross negligence of--Whether decree binds minor—*Res judicata* *See Res judicata* 486

Guardian and Ward—Order declaring infants wards of court and appointing father guardian—propriety. *See* Hindu Law 30

Guardians and Wards Act, S. 19—Order declaring infant ward of court in the life-time of father and appointing him guardian—Propriety of. *See* Hindu Law 30

———**S. 9**—'Ordinarily resident' meaning of. *See* Hindu Law ... 30

High Courts Act S. 15—Powers of superintendence—Order of the Presidency Magistrate declaring inclusion as candidate illegal—No power to revise. *See* Charter Act S. 15 272

Hindu Law—**Adoption**—*Authority to adopt—Construction—Extrinsic evidence—Admissibility of—Limits on the exercise of—Impartible Zamindari—Joint family property—Rule as to adoption to last male owner —Not applicable to—Existence of adopted son's widow—Bar to exercise of authority by widow—Rules imposing limitations—Nature of—Purpose of adoption—Custom of Puo-Brahmin—Adopted son living for 36 years—Not effectuated by.*

Adikonda Deo, Zamindar of Chinnakimidi (an impartible Zamindari) died on 23rd November 1868. Prior to his death, on 2 -11-1868, he gave authority to his wife Kundana Devi to adopt a son to him. In pursuance of the authority, she adopted Brojo Kishore Deo on 20-11-1870. Brojo Kishore died on 3-9-1906 leaving his widow him surviving. Vaishnava Deo, the undivided nephew of Adikonda succeeded to the Zamindari but died 15 days after his accession on 18-11-1906. Defendants 1 and 2 were his sons. Kundana Devi the widow of Adikonda purporting to act on the authority conferred on her by her husband adopted the plaintiff on 1-12-1907 who sued to recover the Zamindari from the defendants.

Held, that the authority conferred on the widow was not exhausted by a single adoption but the existence of the adopted son's widow Ratnamala who though not a person in whom the Zamindari vested, was competent to adopt a son in whom the state would vest in preference to the plaintiff, presented a bar to its exercise.

Per Seshagiri Aiyar J: (Chief Justice *dubitante*), the rule of law that in order that an estate once vested may be divested, the adoption should

Hindu Law—*Contd.* PAGE.

be made to the last male owner is not applicable to co-parcenary property and impartible Zamindari is joint family or co-parcenary property subject to an exception.

Per Chief Justice : With reference to the construction of authorities, to adopt, the only safe rule is to try and ascertain the intention of the donor of the power from the terms in which the authority is given viewed in the light of such extrinsic evidence as would be admissible if the question was the construction of a will. Evidence that the husband who gave the authority was at enmity with his brother and was anxious to exclude him from succession would be admissible extrinsic evidence but evidence that the first adopted son lived for 36 years and that events happened between the granting of authority and the second adoption which if the testator could have foreseen it might have made likely that he would have restricted the authority is extrinsic evidence which is not admissible.

Per Seshagiri Aiyar J :—The fact that it is customary among the Uriya Zamindari families to employ a Po-Brahmin to perform funeral ceremonies to the deceased is not a ground for putting a restricted construction on the authority.

An authority to adopt given by a Hindu husband to his wife is presumed to be general unless conditions have been imposed or limitations placed upon it by him.

The spiritual purposes for which an adoption is made are not effectuated by the adopted son living for 36 years. The only limitations upon the power of the widow to adopt in pursuance of the authority given by the husband recognised by the texts are that "the man should be destitute of a son" and that she cannot delegate the power ; the other restrictions the Courts have thought fit from considerations of expediency to place upon the exercise of that power are attributable to a desire that property should not be divested frequently and capriciously and are the outgrowth of ideas tending to the preservation of peace and quieting of title. Such being the principle of judicial pronouncements relating to the divesting of property, it will not advance justice to crystalise them into inflexible and rigid rules and then to engraft exceptions on them.

Suryanarayana v. *Venkatramana* (1) *Ramkrishna* v. *Sham Rao* followed.

Madana Mohana Deo v. *Purushothama Deo.* (*White, C. J. and Seshagiri Aiyar, J.*) 306

——— *Widow—Consent of Sapindas, object of—Benefit of the family, sole consideration—Grounds personal to sapindas—Withholding of on ground of loss of right to property—Improper—Adoption with consent of remoter Sapindas, valid.*

The object of getting the consent of Sapindas to an adoption by the widow being to get an independent judgment on the expediency of the proposed adoption he is not entitled to act upon ground personal to himself but must act with a deliberate consideration as to what is for the benefit of the family.

Hindu Law.—(*Contd.*) PAGE.

Held accordingly that an adoption with the consent of the more remote reversioners would not be invalid when the nearest reversioner refuses to consent on the ground that he would in the event of adoption lose his right to the property as he should be considered to have withheld his consent on improper grounds.

Venkatarama Raju v. *Bapamma* (*Sankaran Nair and Spencer* JJ)... 638

———**Alienation** by father—Birth of son within 280 days—Effect. *See* Evidence Act 580

———— *by widow of the whole estate—Consent of the next reversioner—Validity of.*

The widow may alienate the whole estate with the consent of the next reversioner.

Debi Prosad Choudhry v. *Golap Bhagat* (I. L. R. 40 C. 721,) *Bijoy Gopal Mukerji* v. *Girindra Nath Mukerji* (18 C. W. N. 673.) distinguished.

Adaikha Maistry v. *Muthusami Ambalagaram* (*Wallis and Oldfield JJ.*) 24

———,*by grandfather—Consent of guardians of minor coparcener—To avoid partition by and alienating whole share—Validity of.*

The guardians of a minor coparcener may validly bind the minor by consent given to an alienation by his undivided grandfather of a portion of the family property to avoid the more injurious eventuality of the latter effecting a partition (which in law he could do without anybody's consent) and alienating the whole of his share got at the partition.

Arunachalla Pillai v. *Sampurna Thachi* (*Wallis and Miller JJ*). ... 485

———, **Authority to adopt**—Limits on the exercise of existence of adopted son's widow—Bar to exercise of power by widow. *See* Hindu Law, Adoption 306

———, **Compromise**—*Family settlement—Alienation by a limited owner.*

The widow of a Hindu "A" under the power to adopt given to her by her husband, adopted "B" but remained in possession of the property of her husband and being predeceased by "B" was succeeded on her death by the widow of "B," whereupon one of the daughters of "A" brought a suit for her share of the property belonging to her father questioning the adoption of B and a compromise was arrived at. When in a subsequent suit the daughter of "B" challenged the aforesaid compromise, on the ground that B's widow, her own mother had no power to come to any compromise as it amounted to an alienation,

Held that the compromise was in no sense of the word an alienation but a family settlement in which each party took a share of the family property by virtue of the independent title which was to that extent and by way of compromise admitted by the other parties and therefore binding on them.

Lala Khunni Lal v. *Kunwar Gobind Krishna Narain* (L.R. 38 I. A. 87 approved.

Musammat Hiran Bibi v. *Mussammat Sohan Bibi* (*Lord Moulton*)*P.C.* 149

Hindu Law.—(*Contd.*) PAGE.

———, **Debts**—*Liability of sons—Suit against father and sons—Decree for mesne profits against father alone—Executability against son's shares—C.P.C. S.* 11.

Where in a suit for possession and for mesne profits against a Hindu father and his sons, a decree for possession was given against all but there was a decree for mesne profits only against the father and in execution the decree-holder attached the entire family properties.

Held that the debt not being one which the sons were not liable to pay under the Hindu Law, their interests also could be proceeded against and the fact that their primary liability had been negatived in the suit, did not preclude the Court from giving effect to their Hindu Law liability by executing the decree against their shares in the family property.

Shiam Lal v. *Ganesh Lal* I. L. R. 28 A. 288 followed.

Yanamandra Papiah v. *Lanka Subbasastrulu* (*Ayling and Napier* JJ). 272

———*Family custom—Babuana—Sohag—Grants for maintenance—Succession only to male descendants in male line—Exclusion of females and daughters—Partition notwithstanding—Operation of custom—Not excluded by showing one case in which custom not followed—Descent to all sons, not to the eldest alone—Putra Pautradi Krame, whether words of general inheritance or limitation—Maintenance of defendant, provision for, in decree—Mesne profits—Refusal of—Maintenance, owing to non-offer of.*

In a suit by a junior member of the Durbangha family for the recovery of his deceased brother's share in certain Babuana and Sohag properties partitioned between them during the latter's lifetime from his widow.

Held: That by the custom of the Raj, such properties descended only to the male descendants of the grantees in the male line and females were excluded from succession.

Held: further that the operation of the custom was not excluded by the fact that there was a complete partition between the brothers.

Held also: that immoveable properties purchased out of the income of the properties formed accretions to them and were claimable by the plaintiff

A well- established family custom cannot be defeated by the fact that the custom was not enforced in one isolated instance.

Though the words "Putra Poutradi Krame" are ordinarily words of general inheritance, having regard to the custom, when applied to Babuana grants, they could not be regarded as such but only as words of limitation.

Nature of Babuana and Sohag grants considered.

The defendant being admittedly entitled to maintenance and there having been no substantial offer of adequate maintenance by the plaintiff before suit their Lordship disallowed the claim for mesne profits and also declared by the decree the proper rate of maintenance payable to the defendant.

Held: upon the evidence in the case that the Babuana grants descend to all the sons of the grantee and not to the eldest alone as assumed in *Durgadut Singh* v. *Maharaja Sir Ramashwar Singh Bahadur* (L.R. 36 I. A. 176 ; 19 M. L. J. 267.

Ekradeshwar Singh v. *Musammat Janeshwari Bahuasin Singh* *Sir John Edge* (*P.C.*) 373

Hindu Law.—(*Contd.*) PAGE.

——— Grant to male and female by the same clause—Inference of nature of estate. See Hindu Law, will 329

——— *Father's right of guardianship over infant sons—Revocation of appointment of custody and alteration of scheme of education—Welfare of minors—jurisdiction of Court having Crown's jurisdiction over infants—Powers of the District Court—Guardians and Wards Act, 1890 S. 9.—"Ordinarily resident" meaning of—Powers apart from the Act—Suit not appropriate procedure—Transfer of suit from District Court to High Court—Powers of High Courts—Order declaring infants wards and appointing father guardian—Propriety of S. 19—Parties —Infants necessary parties—Issue as to the interest of minors—Mandatory order involving action contrary to law of England—Not to be made.*

As in England, so among the Hindus, the father is the natural guardian of his children, during their minority but his guardianship is in the nature of a sacred trust and he cannot, therefore, during his life time substitute another person to be guardian in his place. He may in the exercise of his discretion as guardian, entrust the education and custody of his children to another but the authority so conferred is essentially a revocable authority and if the welfare of the children requires it, he can, notwithstanding any contract to the contrary, take such custody and education once more into his own hands. If, however, the authority has been acted on in such a way as in the opinion of the Court exercising the jurisdiction of the Crown over infants to create associations or to give rise to expectations on the part of the infants which it would be undesirable in their interests to disturb or disappoint such court will interfere to prevent its revocation.

Lyons v. *Blenkin* (Jacob 245-37 E. R. 842) approved.

Where a Hindu father appointed the defendant guardian of the persons of his sons, on the offer of the latter to take charge of them and educate them in England and acquiesced in their departure with her for Europe but subsequently cancelled the arrangement and demanded his children back and on defendant's failure to comply with the same instituted a suit in the District Court of Chingleput for a declaration that he was entitled to the custody and guardianship of his sons and for an order directing the defendant to hand them over to him which was transferred to the High Court under Cl. 13 of the Letters Patent.

Held that the suit was entirely misconceived.

That the plaintiff remained the guardian of his sons notwithstanding that he had affected to substitute the defendant as guardian in his place and that the real questions were whether he was still entitled to exercise the function of guardian and presume the custody of his sons and alter the scheme of education formulated for them and whether the appointment which was a revocable authority could in the events that had happened, be revoked but both these questions could be decided only by the Court exercising the jurisdiction of the Crown over infants having regard to the interests and the welfare of the minors and bearing in mind their parentage and religion and in their presence.

Hindu Law.—(*Contd.*) PAGE.

That the District Court had no jurisdiction over infants except such as was conferred by the Guardians and Wards Act, 1890 and as the infants who had left India months previous to the institution of the suit with a view to be educated in England could not be said to be ordinarily resident in the District of Chingleput that Court had no jurisdiction in the matter.

That the powers of High Court in dealing with suits transferred to it from the District Court are confined to powers which but for the transfer might have been exercised by the District Court.

That a suit was not the appropriate procedure.

Held also that a mandatory oder directing the defendants to take possession of the infants, bring them to India and hand them over to the plaintiff ought not to have been made as any attempt on the part of the defendant to comply with the order, considering the age of the infants, if they refused to return to India, would have been contrary to the law of England and exposed the defendant to proceedings in *habeas corpus* and no Court ought to make an order which might lead to these consequences, that the most a Court of competent jurisdiction could have directed was to order the defendant to concur with the plaintiff in taking proceedings in England to regain the control and custody of the children.

Held further, that the order declaring the infants wards of the Court and appointing plaintiff as their guardian which the District Court could not have made in a suit but which it was alleged that the High Court could in its general jurisdiction, make, could not be supported when the infants were not before the Court, and their wishes not consulted and their interests alse were not adequately considered, and in the face of S.19 of the Guardians and Wards Act which provides that no order declaring a guardian should be made during the life time of the father unless in the opinion of the Court he is unfit to be their guardian.

Annie Besant v. *Narayaniah* (*Lord Parker* (*P.C.*) 30

————**Guardianship**—*Natural Guardian—Whether paternal aunt is—Limitation Act, Art.* 44—De facto *guardian—Alienations by.*

Per Sadasiva Aiyar, J. Under the Hindu Law nobody else than the father and mother of a minor (with probable exceptions in favour of the elder brother and the direct male and female ancestors of the minor) is entitled as a matter of natural right to be and to act as guardian of a minor's person and properties. *Kristo Kishor Noghey* v. *Kader Moye Dossee* (2 C. L.R. 583) *Mussamut Bhikno Koer* v. *Nui khamelu koer* (2 C. W. N. 81) followed.

The paternal aunt is not a natural guardian of a minor under the Hindu Law. Art. 44 of the Limitation Act does not apply to alienations by unauthorised guardians. *Mata Din* v. *Ahmed Ali* (I. L. R. 34 A. 213) followed.

Per curiam: An alienation by a *de facto* guardian need not be set aside when it is shown to be for no necessity at all.

Thayammal v. Kuppanna Koundan (*Sadasiva Aiyar & Tyabji JJ*) ... 285

————Paternal aunt—Whether natural guardian. *See* Hindu Law ... 285

————**Gift by father of interest in family property to only son**—*Validity of—Natural love and affection — Relinquishment — Consideration, necessity for.*

Hindu Law.—(*Contd.*) PAGE.

A gift by a father of all his interest in the family property in favour of his only son being supported by natural love and affection can be upheld as a relinquishment.

A reliquishment to be effective need not necessarily be supported by consideration nor need it to be in favour of all the remaining coparceners.

Thangareelu Pillai v. *Doraisami Pillai.* (*Sadasiva Aiyar & Napier JJ*) 272

———Heir taking as grantee—Character of the estate not affected ... 694

———*Impartible Zamindari—Maintenance—Agreement for—Liability to variation—Binding only against Zamindar executing—Suit for partition—Compromise—Registration Act, S. 17—Subsequent agreement—Maintenance allowance to a person and his lineal descendants—Illegality of—Rule against creation of interests in favour of unborn persons.*

As suit by the 1st defendant for the partition of the Kalahasti Zemindari against his brother who was the then zamindar to which all the other brothers were parties, ended in a compromise by which the zamindari was declared impartible and it was further agreed that the zamindar's brothers (including the present plaintiffs and the 1st defendant) and their male descendants should get a certain maintenance allowance from the income of the estate. The clause as to maintenance however was not embodied in the decree as it was held not to relate to the subject-matter of the suit. But subsequently in 1896, the same maintenance was secured to them by the successor of that zamindar though the terms varied as to the time of payment and the source from which the maintenance was payable. It was made payable out of the estate as its income. In a suit for the recovery of the allowance by the plaintiffs from the 1st defendant who had since become the zamindar it was contended that the financial condition of the zamindar did not admit of the same payment and the contention was upheld.

Held : on appeal.

That the plaintiffs could not fall back on the compromise as its terms varied from the agreements and the rate provided for by the agreements was liable to variation owing to changed conditions.

Held, per Spencer J.—That the appellants could not rely on the terms of the compromise in so far as they affected immoveable property as the agreement was not registered. *Chelamanna* v. *Rama Rao* followed.

A maintenance allowance does not lose its character of being liable to be increased or decreased by the mere fact that it is embodied in a decree or agreement.

An agreement providing for the payment of a permanent allowance to a person and his lineal descendants out of a zamindari is void as contravening the rule of Hindu Law against the creation of interests in favour of of unborn persons.

Per Sankaran Nair J.—In the absence of proof that the agreements were executed under circumstances binding on the succeeding zamindars, they bound only the zamindar that executed them and maintenance not being such a charge as to preclude the zamindar for the time being from alienating portions of the zamindari for necessary purposes, the rate fixed by the agreement was liable to variation owing to changed conditions.

Venkatappa Nayanim Varu v. *Rajah Thimmu Nayanim Varu.* (*Sankaran Nair and Spencer* JJ). 559

Hindu Law—(*Contd.*) PAGE.

———Impartible estate—Joint family property—Rule as to adoption to last male owner—Applicability 306

———Inheritance—Rights of illegitimate children. *See Hindu Law—Stridhanam* 353

———Inheritance—Mitakshara—Bandhus —Heritable sapindaship—Mutuality essential 383

———**Joint family**—*Mortgage in favour of one of the members—Funds belonging to the family—Right of suit without joining the other members—Manager—Right to sue—Disputes in the family or revocation of authority by others—Effect of.*

Where a mortgage was taken by a member of a joint Hindu family in his own name out of funds belonging to the family but without disclosing that he was acting as agent of the family.

Held, that he was entitled to sue on the mortgage without joining the other members

Per Kumaraswami Sastri J:—The right of the manager to sue on contracts entered into with him cannot cease by the mere fact that there are disputes in the family or that the other members affect to revoke his authority to act on their behalf.

Adaikalam Chetti v. *Subban Chetty* (*Sir John Wallis Offg. C.J. and Kumarasami Sastri J.*) 621

———Maintenance of widow—Charge on a portion of the family property—Personal decree 291

———*Alienation by coparcener of his undivided share of family property—Alienee—Auction purchaser, right of, to mesne profits aganist other members—Practice.*

The alienee of the undivided share of a member of a Joint Hindu family does not become a tenant in common with the other members of the family and will not be entitled to the profits of such share from the date of the alienation. *Nanjayya Mudali* v. *Shanmuga Mudali* (26 M. L. J. 576) *Observations in Ayyagari Venkataramayya* v. *Ayyagari Ramayya*: (25 M. 690), *Chinna Pillay* v. *Kalmuthu Pillay* (I.L.R.35 M. 47 20 M.L. J. 456), and *Subba Rao* v. *Ananta Narayana* (23 *M. L. J.* 64) disapproved.

Maharaja of Bobbili v. *Venkataramanjulu Naidu*. (*Wallis C. J. and Kumarasami Sastri* J.) 409

———**Limitation, Art. 144**—*Adverse possession—Alienee from some of the members—Onus—Knowledge of adverse claim.*

Where only some of the members of a Hindu co-parcenary alienate a property in favour of a stranger and the latter takes poessession, it is nevertheless incumbent on the latter to prove that his possession was adverse to the knowledge of the other co-parceners before he can make out title bp prescription.

Muthukrishniengar v. *Sankara Narayana Aiyar*. (*Ayling & Tyabji* JJ.) 600

———**Liability of sons for the debts of the father**— *Creditor not restricted to suit against all sons or against each for aliquot part.*

Where sons are sought to be made liable for a debt of their deceased father, there is no rule restricting the creditor to a suit against all the sons or if he sues one only to a suit for a portion of the debt, proportioned to

Hindu Law—(*Contd.*) PAGE.

his share in the joint family property - he can get a decree for the whole amount payable out of the joint family property or separate property of the father in the hands of the son.

Salem Town Bank (Ltd.) v. *Ramaswami Aiyar.* 236

———**Maintenance of widow**—*Joint family—Calculation—With reference to income and share of the husband at the date of suit—Personal decree refused—Charge on a portion of family property only arrears—Right to, in the absence of waiver.*

Where in a suit by a widow for maintenance against her husband's brothers it appeared that the major part of the income of the family was derived from a family trade in which the plaintiff's husband took part but had developed considerably since his death.

Held that the amount of maintenance should be fixed by reference to the income of the family as it stood at the date of the suit and not as it stood at the date of the husband's death.

Held that the basis of calculation also should have reference to the husband's share as at the date of suit if he were then alive and not as it was at the date of his death.

Adhi Bai v. *Cursandas Nathu* (*I. L. R.* 11 *Bom.* 199) *Madhava Rav Keshav Tilak* v. *Ganabhai* (I. L. 2. Bom. *639*) *Sukan Sahu* v. *Gangajali* (13 I. C. 436) followed.

In the circumstances, their Lordships thought that a personal decree was unnecessary or that the maintenance should be made a charge on all the family properties and gave a decree merely charging rhe maintenance on a portition of the family properties.

A Hindu widow is entitled to arrears of maintenance in the absence of waiver.

Manika Mudaliar v. *Soubagia Ammal* (*Sankaran Nair and Spencer* JJ). 291

———Maintenance—Impartible Zamindari—Agreement for maintenance—Liability to variation—Reasons for—Interest in favour of unborn sons 656

———**Mitakshara School—Inheritance**—*Sapinda—Bhinna Gotra Sapinda-Fifth degree from the propositus—Mutuality of sapindaship, essential—Principles of construction—Classes of heritable relationships—Addition to if permissible—Sapindaship--Meaning of—Crown—Rights of against relations beyond five degrees.*

Held, that the Sapinda relationship (according to the Mitakshara school) on which the heritable rights if founded, ceases in the case of Bhinnagotra Sapindas with the fifth degree from the propositus and that in order to entitle a man to succeed to the inheritance of another he must be so related to the latter that they are sapindas of each other.

GridhariLal Roy v. *The Government of Bengal* (12 M.I.A. 448) which laid down that the enumeration of bandhus was not exhaustive but merely illustrative does not warrant the contention that the classes specified by Vijnaneswara can be added to. (Their Lordships express no opinion on the point.)

Quære if the Crown can succeed against persons related beyond five degrees through females.

Hindu Law.—*Contd.* PAGE

The Hindu law contains its own principles of exposition and questions arising under it cannot be determined by abstract reasoning or analogies borrowed from other systems of law but must depend for their decision on the rules and doctrines enunciated by its own lawgivers and recognised expounders

Sapinda relationship on which the right of inheritance is founded under the Mitakshara mean consanguinity in a distinct legal sense as explained by the author in the Achara Kanda.

Authorities on Hindu Law reviewed, *Babu Lall* v. *Nankuram* (22 Cal. 339), *Umaid Bahadur* v. *Udai Chand* (6 Cal. 119), *Lullubhai* v. *Nankuvarbhai* (2 B. 388), Mayne's Hindu Law, West and Buhler's Digest of Hindu Law Vol. 1 p. 119, 120, Sarvadhikari's Tagore Law Lectures, Shastri Golap Chunder Sarkars's translation of Viramitrodaya, Rao Vishwanath Mandlik's translation of Yajnavalkya, Commentary on Hindu Law by J. N. Bhatacharya referred to.

Ramchandra Martanda Waikar v. *Vinayak Venkatesh* (Mr. *Ameer Ali* (*P. C.*) 383

————**Nattukottai Chetties**—*Trade assets-Family property—No difference between.*

In the case of Nattukottai Chetties, there is no difference between trade assets and family property. (*Chidambarem Chetty* v. *Ramasami Chetty* (27 M. L. J. 631) followed.

Arunachalam Chetty v. *Velliappa Chetty* (*Sadasiva Aiyar and Napier JJ.*) 651

————**Necessity**—*Alienation by a Hindu widow—Ijara—Consent of reversioners—Acquiescence on the part of reversioners—Family settlement.*

Where it appeared that at a time when the widow was not in possession though she had established her right after a long litigation and there was danger from the growth of adverse rights in actual possessors of the land she had granted an Ijara for 60 years in favour of two of the reversioners and a Dar Ijara some time after in favour of the other, the effect of which was that the property was divided up by her among the reversioners reserving for herself a small income as maintenance and on the death of one of the grantees of the Ijara, his sons continued in enjoyment till the death of the widow which took place 11 years after.

Held, in a suit by them to set aside the ijara as an unauthorised interference with their reversionary interest.

agreeing with the High Court, that the arrangement was dictated by necessity and was binding on the estate.

That there was no reason to hold that the settlement by which peace for 30 years was brought into the family was on unjust arrangement thrust upon a helpless widow by her influential relatives, that the fair inference from their conduct was that they believed that the arrangement had been made in good faith and under circumstances of necessity.

It is a feature of the law as administered by the Board to attach great weight to the sanction by expectant reversioners of an alienation of property

Hindu Law—(*contd.*) PAGE

by a Hindu woman as affording evidence that the alienation was under circumstances which rendered it lawful and valid.

Bijoy Gopal Mukerji v. *Grindra Nath Mukerji.* (*Lord Moulton P.C.*) 213

———Perpetuities—Annuity to a person and his heirs—Charge on the estate in default of payment—Validity of 694

———Relinquishment by father-Whether should be in favour of all other coparceners. *See Hindu Law Gift* 272

——— **Rule against perpetuities**—*Annuity to a person and his heirs may be charged on estate on default—Deed—Construction—Charge or personal covenant—Santati Paramparyamayi—Collateral heir inclued—Transfer of Property Act, S. 40—Heir taking as grantee—Character of the estate not affected—Release—Construed as transfer.*

Where in settlement of the rights of a claimant to the Zamindari of Ramnad, the then Zamindarni covenanted for herself and the future holders of the Zamindari that they would pay to the covenantee and his heirs (*Santati Paramparyamayi*) a monthly allowance of Rs. 700.
Held Per Chief Justice : that the allowance was not a charge on the estate but was in the nature of an annuity and could in default of payment be made a charge on a portion of the Zamindari.

Per Seshagiri Aiyar J.: that on a proper construction of the agreement, the allowance must be deemed to have been made a charge on the Zamindari but even otherwise the covenant was one annexed to the ownership of the Zamindari and ran with it under S. 40 of the Transfer of Property Act.

Held *Per Curiam* : that in any view, the provision was not obnoxious to any rule of Hindu or English Law against perpetuities.

Held further : that the agreemeat enured for the benefit of not only the lineal heirs but also of the collateral heirs of the covenantee.

Held also : in the circumstances of the case the fact that the present Zamindar took the estate under a trust deed did not affect his liability.

Per Chief Justice. Quaere : whether it was open to the late Raja to discharge his heirs of the liability by means of a voluntary conveyance in his favour.

Per Seshagiri Aiyar J ; where property is given to a person who would otherwise be entitled to it as heir, the character of the property is not changed whether the transfer is *inter vivos* or by will.

Where the admitted heir of a deceased person executed in favour of another a deed which after reciting that there was some question whether he or the other was the heir, provided that in consideration of a payment of Rs. 1000 the former should give up in favour of the latter his claim as heir of the deceased and all rights connected therewith and that the latter should enjoy the estate with all rights of ownership and that the executant and his heirs should have no claim to it.

Held, that the deed operated as a valid transfer of his rights as heir.

Rajah of Ramnad v. *Sundarpandiaswami Thevar.*) *The Chief Justice and Seshagiri Aiyar* J) 694

Hindu Law—(*contd.*) PAGE

————**Stridhanam**—*Succession to —Degraded woman—Competition between legitimate son and illegitimate daughter—Rights of illegitimate children under the Hindu Law—Law applicable to dancing girls whether to be applied to offspring of prosititutes—Unchastity—Whether severs ties of blood.*

Unchastity of a Hindu woman does not sever her relationship with her kindred and the Stridhanam property of a degraded woman devolves according to the ordinary rules of Hindu Law.

In a competition between the legitimate son and an illegitimate daughter *held* that the son excluded the daughter in succession to the stridhanam of the mother.

Illegitimate children have no rights of inheritance under the Hindu Law especially in the Mitakshara system unless the texts specially provide for them as in the case of the illegitimate sons of Sudras.

Unchastity of a married woman will not bring her within the class of dancing girls so as to enable her to exercise the rights which by custom and precedent have been allowed to them.

The word 'daughter' in the Chapter on succession should be understood in its primary sense of legitimate daughter.

Minakshi v. *Muniandi Pannikka* (*Oldfield and Seshagiri Aiyar JJ*) ... 353

————Succession—Custom excluding widows and females ... 373

————Widow—Maintenance—Calculated with reference to income of the family at the date of suit 291

————**Widow**—*Sale by—Major portion of consideration binding-Bona fide—Price not unreasonably low—Sale upheld.*

Where the major portion of the consideration for a sale by a Hindu widow was found to be binding on the estate and it was also found that the sale was *bona fide* and the price paid was not unreasonably low.

Held, that the sale should be upheld *Felaram Roy* v. *Bagalanand* 14 C. W. N. 895) followed.

Thalagara-Ramanne v. *Kalagare Gangayya* (Miller and Tyabji JJ.) 132

————Widow—Adopted son—Adverse possession against—Suit to recover possession of immoveable property—Limitation ... 569

————Will—In favour of females—Construction—Nature of estate—Limited or absolute 329

————**Bengal School Will**—*Executor—Sale by, without stating that sale is as executor—Stridhan—bona fide purchaser for value—Unmarried daughter of daughter as legatee—Deed—Construction—Plain interpretation—not to be controlled by indications of intention.*

Where a Hindu had given away by will his house to his daughter subject to certain annuities and appointed one of her sons as one of the executors who to pay off certain mortgage debts created in the interest of the estate, sold the house in question without expressly mentioning in the deed that he was selling as executor, but on the other hand stating that he (and others) were selling "all the estate right, title, interest, claim and demand whatsoever of the vendors unto and upon the said messuage, land, hereditaments and premises and every part thereof, and also all deeds papers, and writings solely relating to the said premises or any part

thereof now in the custody of the vendors or which they can procure without suit," on the death of the daughter one of her unmarried daughters claiming the estate as stridhan of her mother calling to question the conveyance thereof by her brother as by one that had no title thereto under the Bengal School of Hindu Law.

Held that the conveyance by the vendors of all the right, title and interest which they possessed included the right which one of them possessed as executor.

That to hold on what the court considers the indications in the deed and the intention of the parties that only the beneficial interest possessed by the vendors should be conveyed would be to contradict the deed itself, that it is a settled rule of interpretation that a deed must be interpreted by the language used interpreted in its natural sense.

That it would be entirely contrary to settled principles of law as well as most unjust to *bona fide* purchasers were the Courts to allow its plain legal interpretation to be affected by speculations as to what particular rights existing in the various vendors were present to the minds of some or all of the parties to the conveyance at the date of the execution.

Bijraj Nopani v. *Sreemutty Pura Sundary Dassee* (*Lord Moulton P.C.*) 93

——**Will in favour of females**—*Construction—Nature of estate—Limited or absolute estate—Grant to a male and female by the same clause—Use of same words for charity—Inference of absolute estate to all.*

Per White C. J.—The presumption or rule of construction that under a Hindu will where the testator devises or bequeaths property to a female the intention is that she should take only a life estate does not apply to a case where from the will as a whole the intention is clear that she should take an absolute estate.

Per Seshagiri Aiyar, J.—Where the words of gift are capable of conferring an absolute estate, it cannot be cut down simply because the devisee is a female, *Sambasiva Aiyar* v. *Venkataswara Aiyar* (1) (I. L. R. 31 M. 179) referred to.

Tendency towards a more liberal construction in case of grants to women referred to.

Where a testator devised property by one single clause to his brother's daughter and a niece's son who were to take as tenants in common, and the same expression was used when giving property to a charity, *Held* that the proper inference was that the same kind of estate was conferred on all the legatees and all of them took absolutely.

Ramanuja Aiyangar v. *Satagopachariar.* (*Sir Arnold White C. J. and Seshagiri Aiyar J.*) 329

——**Will**—*Construction—Annuity for life for maintenance given by will of the husband—Does not lapse for unchastity—Conditions not to be added.*

There is no certain and necessary implication that a Hindu who provides for the maintenance of his wife after his death intends to deprive her of it if she should become unchaste.

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It is not open to courts to add to the terms of the will and impose conditions on the legatee which the testator might have imposed if certain contingencies were present to his mind.

Held accordingly that an annuity given to the wife for her maintenance by the will of the husband purporting to be for her life would not lapse by her unchastity.

Parami v. *Mahadevi* (I.L.R. 34 B. 278) followed.

Bommaya Hegade v. *Jalayakshi* (*Sadasiva Aiyar and Tyabji JJ*)... 305

Hindu Transfers and Bequests Act—*Madras Act I of 1914—Retrospective operation of—Will—Construction—Bequest in favour of unborn persons—Validity of—Gift as Stridhanam but provision for property going to descendants—Effect of.*

Madras Act I of 1914 has retrospective operation only to the extent that it applies to wills made before the passing of the Act where the dispositions are intended to come into operation at a time which is subsequent to the passing of the Act. It has no application when the testator died long before the passing of the Act and according to the law then in force the property has vested in the heirs on the footing that the dispositions are invalid as being in favour of unborn person.

Where a will provided that the testator's children should remain together and hand over their earnings to the executors who are to support them, that the earnings so handed over and the rents collected with any surplus should be accumulated for the benefit of the grandchildren and that the property should be taken by his grandchildren on the death of his children; the grandchildren being unborn at the death of the testator. *Held* that the disposition was invalid and the property vested in the heirs of the testator as on an intestacy, but that a provision in the will that out of the income, 100 persons should be fed annually as a matter of charity, was valid.

Where property was given to a daughter as Stridhanam but it was also provided that on her death the property should go to her descendants. *Held*: the fact that the disposition in favour of the descendants is invalid, would not invalidate the disposition in favour of the daughter and that she took the property as her stridhanam.

Varadaraju Mudaliar v. *Narayanasami Mudaliar.* (*Kumarasami Sastri J.*) 681

Inam-Temple service—*Grant by Government and not by temple authorities—Alienation—Trustees cannot intervene to prevent—Successor in office—May sue to recover.*

Where the inam is one granted by the Government to a person doing service in the temple and not one granted by the temple authorities, the latter cannot intervene to prevent alienation though the Government might.

Obiter: if the present servant is removed, the successor in office could recover the inam on the principle of *Pakkiam Pillai* v. *Seetharama Vadyar* (14 M. L. J. 184.)

Matte Sarayya v. *Vepparathi Vydyanatham.* (*Miller and Sadasiva Aiyar JJ.*) 57

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Inam—Granted by Zamindar and confirmed by Government—Not resumable by temple trustees—Right of resumption in Government. *See* Religious Endowments 179

Inam Agraharam Village—Grantee owning the Kudivaram at the time of the grant—Presumption as to. *See* Madras Estates Land Act ... 567

Inheritance—Right of illegitimate children. *See* Hindu Law—Stridhanam. 353

————————Whether the same law applicable to prostitutes as to dancing girls. *See* Hindu Law—Stridhanam 353

Insolvent Debtor's Act, 1848 (11 & 12 Vic. Ch. 21)—*Judgment-debtor—Sale by Official Assignee—Sale—Execution of decree after vesting of property in Official Assignee—Notice—Procedure—S. 49—248, 32, 372 and 291 of Civil Procedure Code of 1882—Practice—Raising point of limitation for the first time.*

Where subsequent to the attachment and order for sale of certain property an order was made under the Insolvent Debtors' Act, 1848, vesting the properties in question in the Official Assignee who was then served with notice as to why he should not be brought on record in place of the judgment-debtor and on his failing to appear the property was sold by auction, the Official Assignee also selling the properties in due course, and an action being brought to determine which sale was valid :

Held, that attachment in execution though followed by an order for sale did not confer on the judgment-creditor any charge on the property, its effect being only to avoid private alienation, that the effect of an order in insovency being to vest the property in the estate of the insolvents in the Official Assignee and to bring the judgment-creditor's claim down to the level of the claims of other creditors, the sale in execution was irregular and that of the Official Assignee good.

That the notic issued to the Official Assignee being only one to show cause why he would not be substituted in place of the judgment-debtor and not one as it ought to have been under S. 248 to show cause why the decree should not be executed against him, the order could not bind the Official Assignee.

Having regard to S. 49 of the Insolvent Debtor's Act, the proper order the executing court should have made under the circumstances was to stay the sale.

Sarkies v. *Mussammat Bhundho Baee* 1 N. W P R. 172 *Goodall* v. *Mussoorie Bank Ltd.*, I. L. R 10 A 97 *Gopal Chunder Chatterjee* v. *Gunamon Diasi* I. L. R. 20 C 370 approved. *Malkarjun Bin Skidramappa Pasare* v. *Narhari Bin Shivappa.* L. R. 27 I A 216 held not applicable.

Held, further, that a point of limitation never raised at any stage of the proceedings in courts below, and which required an inquiry into facts could not be raised for the first time before the Privy Council.

Ragunath Das v. *Sundar Das* (*Lord Parker P.C.*) 216

Inventions and Designs Act (Act V of 1888), Ss. 20, 29—*Suit for infringement of Patent—Pleas—Want of subject matter—Included in—General Clauses Act,—S. 6—Indian Patents and Designs Act II of 1911—Suits instituted before—Applicability of—In respect of defences upon.*

Under the Patents Act of 1888, the defendant in an action for infringement of Patent is not allowed to raise the defence that the device is not new unless he satisfies the conditions of S. 29 Cl. (4).

Plea of want of subject-matter is included in the plea of want of novelty and is excluded by the section.

Having regard to S. 6 (e) of the General Clauses Act, the provisions of Act II of 1911 enlarging the defences open in a suit for infringment cannot apply to suits instituted before the coming into force of that Act. *Sundara Rajam v. Kuppusami Iyer.* (*The Offg. Chief Justice and Seshagiri Aiyar J.*) 573

Jalkar (fishery) grant by Sovereign—*Several Fishery—Tidal rivr—Changing of the course—Right to follow the river—Property in the bed of the. iver—Riparian owners—English and American Law—Evidence of grant—Stare decisis—Application of law in other country or of different time—Regard to be had to historical, social and physical condition.*

In a suit by the plaintiffs as proprietors of a several fishery in certain tidal navigable rivers for possession of an exclusive fishery in a portion of a river channel they were not able to produce the original grant but produced among other papers (i) an Ekjai Hustbud in respect of their Pergunnah for the year 1790 which showed that it included a Mahal julkar (ii) a Hakkikat chowhaddi bandi for the year 1795 which showed that the name of the Jalkar Mahal was the river Balwanta and Bil Baoor with specified boundaries though only part of it was now traceable (iii) Dowl Kabuliyats of 1798 and 1799 specifying the amount of dowl Jumma of the Jalkar (iv) an Isomnavisi Mouzbavari of 1821 mentioning the Jalkar of the river Balbanta as a mouza of plaintiff's pergunna (v) a robokari of the Court of the Collector of Faridpur which recognised that a Mahal Jalkar was included in the plaintiff's pergunnah and also gave the upstream and downstream limits.

Held though the evidence of a Government grant of an exclusive fishery in navigable waters ought to be conclusive and clear, in so far as such evidence could be expected to be forthcoming as to grants more than a century old, the evidence in this case was sufficient to show that the competent authority the Government of India in the right of the Crown did actually grant to the plaintiff's predecessors in title or settle with them so as in effect to give Jalkar right of several fishery in certain of the waters of the portion of the Ganges system in question.

Held further that under the rule of law settled by the decisions in Bengal, plaintiffs as such grantees were entitled to follow the shifting river for the enjoyment of their exclusive fishery so long as the waters form part of the river system within the upstream and down stream limits of their grant and whether the Government owns the soil subjacent to such waters as being the long established bed or the soil is still in the riparian proprietor as being the site of the river's recent encroachment.

Jalkar—(*Contd.*) PAGE

Held also that as it was not shown that the rule established by the judicial decisions in Bengal was mainfestly unjust or flagrantly inexpedient, their Lordships would not substitute for it a rule of Common Law which was framed for widely different conditions prevailing in England.

Indian, English and American rules as to waters stated and compared.

In proposing to apply the juristic rules of a distant time or country to the conditions of a particular place at the present day, regard must be had to the physical, social and historical conditions to which the rule is to be adopted.

Hori Das Mal v. *Mohamad Jaki* (I. L. 11 C. 484) *Ishur Chand Ram* v. *Ramchund Mokhurji* (1. S. D. A. Rep. 221) *Gopeenath Roy* v. *Ramchunder* (1 Macnaghten's Select Reports 228, : 2 Sevester's Rep. 467.) *Lukhee Dasee* v. *Khatinah Beebee* (2 S. D. A. Rep. 51) *Nobokishen Roy* v. *Uchchoolmund Gosain* (2 Sevester 465 Note.) *Ramanath Thakoor* v. *Eshanchunder Banerjee* (2 Savester 463. (*Gureeb Hossein Chowdhri* v. *Lamb* (20 S. D. A. Rep. 1857—1861) *Nobinchunder Roy Chowdry* v. v. *Radha Peeree Debia* (6 Suth W. R. 17) *Gobind Chunder Shaha* v, *Kahja Abdool Gunie* (6 Suth W. R. 41.) *Tarine Churn Sinha* v. *Watson and Co.*, (I. L.R. 17 Cal. 963), *Gray* v. *Anund Mohun Moitra* (W. R. 108) *Jogendra Narayan Roy* v. *Craw ford* (I. L. R. 32 Cal. 1141 *Bhaba Prasad* v. *Jogadindra Nath Kay* (I. L. R. 33 Cal. 15) *Mayor of Carlisle* v. *Graham* (I. L. R. 4 Ex 365—368 per Kelly C. B.) *Foster* v. *Wright* (4 C. P. D. 438 (P. C.) *In re Hull and Selly Ry, Co.*, (5 M. and W. 327.) *Forbes* v. *Meer Mohamed Hossein* (12 B. L. R. 216) *Prosunne Coomar Sircar* v. *Ram Coomar* (I. L. R. 4 C. 53) *Parodey* v. *Seele Kint Banerjee* v. *E. I. Co.*, (6 M. I. A. 267) *Nogendro Chandrase Gho* v. *Mahomed Esoff* (10 B. L. R. 406) *Chundar Jalesh* v. *Ram Chunder Mookerjee* (15 Suth W. R. 212) *Mohiny Mohun Dass* v. *Khaja Ahsanullah* (17 Suth W. R. 73) *Collector af Maldah* v. *Syed Suduradirc* (1 Suth W. R. 216) *Huree Hur Mookerjee* v. *Chunderyhum Dutt* (17 S. D. A. Rep. 641) *Collector of Rungpore* v. *Ramjadub Seni* (2 Sevester, 378) *Radha Mohun Mandal* v. *Neel Mudhub Mandel* (24 W. R. 200) *Satcowri Ghosh Mondal* v. *Secretary of State for India* (I, L. R. 22 Cal. 252) *Mercer* v. *Denne* (2 Ch 558.) *reviewed.*

Raja Srinath Roy v. *Dinabandhu Sen.* (*Lord Sumner P.C.*) ... 419

Jurisdiction of Civil Courts—Inam village—Admission of plaintiff regarding Kudivaram—Ousting of Jurisdiction. See Madras Estates Land Act 283

———of Courts having Crown's jurisdiction over infants. See Hindu Law 80

———Not excluded in the absence of special provision ... 784

———**Ejectment**—Suit by owner of part of an estate against tenant—Cognisable only in Revenue Courts—Madras Estates Land *See* Madras Estates Land Act 490

Jurisdiction of Civil Courts—(*Contd*) PAGE

——Judgment of English Court on a non-resident Indian subject—Conferred by statute 679

——**Objection to**—Whether can be raised before the Privy Council—The point raised only in the first Court. *See* Sonthal Parganas Regulation 459

Kulachar attaching to Babuana and Sohag Grants, *See* Hindu Law-Family custom 373

Land Acquisition Act (Act I of 1894)—Ss. 19,23.—*Burden of Proof On the claimant to prove value insufficient—Reasons not given by Collector Effect of—Speculative value by reason of proposed land development—When to be taken into account—Hope that the very lands might be acquired—Prices paid under useless enhancement of value to due to hope of rise in the value of lands not acquired otherwise—Basis of value to be kept separate.*

In land acquisition cases, the ordinary rule is that the burden is on the claimant to prove that the valuation by the Collector is insufficient but the burden varies according to the nature of the enquiry made by the Collector. If no evidence has been taken by the Collector and he has given no reasons to support this conclusion the burden is very lightly discharged his mere *ipse dixit* being of little weight and no *prima facie* evidence of the correctness of the award.

Effects which any suggested land development may produce on prices must be excluded except to the extent to which it is shown that such speculations have actually entered into the market price of the land to be acquired.

Secretary of State for Forign Affairs v. *Charlesworth Pilling & Co.* (26 Bom. 28) followed.

Where in the hope that the very lands might be acquired, high prices have been paid for them the speculative value so attached is of little assistance in fixing the market value. But when it is known that there will be some scheme of development and it is hoped that the scheme will enhance the value of the lands not actually acquired, such enhancement in value must be taken into account.

The bases on which the valus of the lands acquired is calculated are numerous but it is necessary to keep the basis actually adopted clear and not to shift the point of view.

Marwadi Padmaji Miachand v. *Deputy Collector of Adoni* (*Tyabji and Spencer JJ*). 106

Landlord and tenant—Patni Regulation—Sale free of undertenures—Landlord and tentant relationship essential. *See* Patni Regulation ... 4

————*Transfer of occupancy right—Liability for rent after notice to landlord—Tenancy created by contract and cases governed by Transfer of Property Act or Estates Land Act excepted.*

In cases not governed by the Estates Land Act or the Transfer of Property Act provided that the tenancy is not one created by contract, the occupancy tenant, who transfers his interest ceases to be liable for rent after he gives notice to the landlord of the transfer.

Landlord and tenant—(*contd*). PAGE

Ranga Ramanujachariar v. *Srinivasa Aiyangar* (*Sadasiva Aiyar* and *Tyabji* JJ). 397

Legal Practitioner's Act, S. 28—*Promissory note for out-fees not filed in Court—Dismissal of suit—Civil Procedure Code, O. 2, R. 2—Suit on original cause of action not barred—Limitation Act, S. 19—Acknowledgment—Practice—Point of limitation raised in revision—Mixed question of law and fact—Not open.*

Dismissal of a suit on a promissory note given to a Vakil for out fees on the ground that it was not filed in Court as required by S. 28 of the Legal Practitioner's Act does not bar a fresh suit on the original cause of action and the promissory note may be used as an acknowledgment of the original liability.

A point of limitation cannot be raised for the first time in the High Court in revision when it involves a mixed question of law and fact.

Natesa Mooppan v. *Ramachandra Aiyar* (*Kumarasami Sastri J.*) ... 728

Letters Patent Cl. 17—Powers of High Court under. *See* Hindu Law ... 30

———**Cl. 15**—Appeal against an order dismissing revision petition. *See* C. P. C. O. 23 R. 1. 780

Limitation—Some of the co-heirs barred—Whether benefit accrues to the other co-heirs. *See* Mahomedan Law 89

———**Adverse possession**—*Suit against Government—Public pathway—Possession for over twelve years—Presumption—Burden of proof of possession by Government within 60 years—Rule as to—Not inflexible.*

Where it was found that the plaintiff was in occupation of a portion of a public pathway since 1868 and no act of possession on his part or on the part of the Government prior to that date was proved.

Held, that the pathway being presumably enjoyed by the public, there could be no presumption of possession by anybody else before that time against the Government and plaintiff's suit was rightly dismissed.

Per Kumarasami Sastri, J:—There is no inflexible rule that in a suit against the Government for recovery of possession against the Government plaintiff is entitled to succeed merely by showing possession for over twelve years before suit unless Government can show possession within 60 years. All that the cases decide is that when possession whose origin cannot be definitely fixed has been proved against the Government for a long series of years (not less than twelve) it is reasonable to presume that such possession commenced at a period over 60 years ago so as to throw on the Government the onus of showing either subsisting title or possession within 60 years.

Sambasiva Mudaliar v. *Secretary of State for India* (*Seshagiri Aiyar* and *Kumarasami Sastri JJ.*) 299

Limitation Act (XV of 1877), S. 4, Art. 179—Mortgage decree—Appeal to Privy Council—Dismissal of appeal for non-prosecution—When time begins to run. *See* Patni Regulation 4

Limitation Act—(*contd*). PAGE

———(**XV of 1877**), **S. 4, 2nd Schedule, Art. 179.**—*Decree Registration—Practice—Dismissal of appeal for non-prosecution under Rule V of Order in Council dated June 13, 1853.*

Where an appeal to the Privy Council from a decree of the High Court in a mortgage suit stood dismissed for want of prosecution under Rule V of the Order in Council of June 13,1853.

Held, that Art. 179 of the Limitation Act governed the case and that time ran from the date of the High Court decree and not from the date of the dismissal of the appeal in the Privy Council as there was no final order or decree of the Privy Council dismissing the appeal and also none was necessary under the rule.

Batuk Nath v. *Musammat Munni Dei* (*Sir John Edge*) (*P.C.*) ... 1

———(**IX of 1908**), **S. 5.**—*Ex parte order excusing delay—Liability to be objected to at the hearing by the other side.*

An order excusing delay under S. 5 of the Limitation Act passed *ex parte* without notice to the other side can be objected to by the latter at the hearing.

Quaere if an *ex parte* order setting aside an abatement also would not stand on the same footing.

Malli Reddi v. *Peddakka* (*Sadasiva Aiyar and Tyabji* JJ.) ... 147

———**S. 14, art. 62, 120**—*Suit for refund of assets—C. P. C., S. 73—"To the use of the plaintiff"—Intention of receiver not test—Time taken in revision—After order and before revision—Not to be excluded—Good faith, prosecution in.*

The article applicable to a suit under S. 73, C. P. C. for refund of assets is art. 62 and not art. 120.

Vishnu Bhikaji v. *Phadke* (I. L. R. 15 Bom. 438) followed.

The intention of the defendant at the time of the receipt of assets is not the test by which the question whether the money is received to the plaintiff's use within the meaning of art. 62 is to be determined.

Mahomed Wahib v. *Mahomed Ameer* (I. L. R. 32 Cal. 527) approved.

Ramasami Chetty v. *Harikrishnama Chetty* (21 M.L.J. 705) dissented from.

Time taken in unsuccessfully prosecuting a revision petition against the order cannot be excluded as such prosecution cannot be said to be in good faith having regard to the practice of the High Court not to interfere in revision when a remedy by way of suit is open.

The time between the date of the order and the date of the presentation of the petition cannot in any event be excluded. In this matter appeals and revisions do not stand on the same footing.

Raja Krishto Roy v. *Beer Chunder Joobraj* (6 W. R. 308) distinguished.

Baijnath Lala v. *Ramdoss.* (*Ayling & Hannay* JJ.) ... 640

———**S. 31, Cl. (1)**—*Mortgage—Date of execution immaterial-Express transfer or express agreement, conferring power of sale unnecessary.*

The question whether a document is or is not a mortgage within the meaning of S. 31, Cl. 1 of the Limitation Act does not depend upon the

Limitation Act—(*Contd*). PAGE

date of its execution and a document which satisfies the requirements of S. 58, Transfer of Property Act is equally a mortgage within the meaning of S. 31 of the Limitiation Act whether the document is one executed before or after the Transfer of Property Act.

A document may be a mortgage though it does not contain an express transfer of interest or an express agreement conferring a power of sale.

Ramabrahman v. *Venkatarasu* (23 M. L. J. 131). followed.

Venkatarama Aiyar v. *Suppa Naidu*. (*Miller and Sadasiva Aiyar* JJ.) 58

——**Art. 44**—Whether applies to alienations by *de facto* guardians. See Hindu law 285

——**Art. 116**—*Vendor and purchaser—Registered sale deed—Implied covenant for title—Knowledge of defect of title—Not excluded by—Breach—Limitation applicable to.*

In all registered conveyances executed after the Transfer of Property Act, a covenant for title is implied by S. 55, cl. 2 of that Act and the breach of that covenant is a "breach of a contract in writing registered", within the meaning of art. 116 of the Limitation Act.

Krishnan Nambiar v. *Kannan* (I.L.R. 21 M. 8) followed, *Kovvur Basivi Reddi* v. *Nagamma* (I. L. R. *35 M. 39*) dissented from, *Hanuman Kamat* v. *Hanuman Mandur* (I. L R. 19 C. 123) distinguished.

The covenant is not excluded by the mere fact that the vendee was aware of the defect in title.

Subbaraya Reddiar v. *Rajagopala Reddiar* (1914 M.W.N. 376), followed.

Aruanchella Aiyar v. *Ramaswami Iyer*. (*Sadasiva Ayiar and Napier* JJ.) 517

——**Art. 124**—Religious Office—Receipt of income—Not possession of office—Actionable wrong. See Religious Endowment ... 100

——**Art. 142, 144**—*Property under lease—Mortgage by trustee for his own purposes—Court sale and delivery—No evidence of collection of rent—Burden of proving non-collection by defendant—Dedication—Evidence of.*

Where in execution of a decree upon a mortgage in favour of the defendant executed by the previous trustee for his own purposes without disclosing that he was a trustee of the property which was at the time under lease in favour of a third party was sold and purchased by the defendant who was also put in formal possession and there was no evidence that at any time thereafter, rent was collected by the temple.

Held, that art. 142 applied to the case and more than 12 years having elapsed from the date of delivery to the defendant, the suit by the succeeding trustee to recover the property was barred.

There having been court delivery the burden was on the plaintiff to show that the defendant did not collect rent and was not in possession.

In the absence of any written grant or evidence of exclusive appropriation of the profits for the purposes of the temple, the mere fact that the income of the village had been used for the temple for a long time, that in the accounts the village was called jari or Tanaka to the temple and even the circumstance that the village was listed as a temple Village and was

Limitation Act—(*Contd*). PAGE.

administered by the Davastanam department, (the Raja being the hereditary trustee of the temple was held insufficient to make out a dedication of the village to the temple.

Per Tyabji, J.—The fact that people were willing to enter into dealings with reference to the property on the footing that it was Raja's private property was a circumstance that could be relied on to show that there was no dedication.

Govinda Doss v. *Rajah Venkata Perumal.* (*Miller and Tyabji JJ.*) ... 195

——**Art. 144, 91**—Applicability to suits by junior Imembers of an Aliyasantana family to recover possession of property alienated *See* Aliyasantana Law. 60

——**Art. 144**—*Hindu Law—Widow—Adoption—Adverse possession against—Not adverse to adopted son—Suit within twelve years of adoption.*

Adverse possession against the widow is not adverse possession against the adopted son and a suit brought by him for the recovery of immoveable property belonging to the estate within 12 years of his adoption is in time.

Sriramulu v. *Krishnamma* (I. L. R. 26 M. 143), *Moro Narayan Joshi* v. *Balaji Ragunath* (I. L R. 19 B. 809), *Hari* v. *Waman* (2 B. L. R. 411), *Haruck Chand* v. *Bejoy Chand Mahtoh* (9 C. W. N. 795), followed.

Kancharla Venkatraman v. *Koganti Venkatramiah* (*Wallis Offig. C. J. and Seshagiri Aiyar JJ*) 569

——**Art. 166**—*Civil Procedure Code, S. 47—Order XXI, rr. 89, 90 S. 151—Inherent powers—Scope of—Sale contrary to direction in decree—Application to set aside—Limitation for.*

Where a sale took place contrary to the direction in the decree that it should take place in a certain order.

Held: per *Oldfield* J. that the application to set aside the sale on that ground was one under S. 47 Civil Procedure Code and would be governed by art. 166 of the Limitation Act.

Art. 166 is not confined to applications under Order 21, rr. 89, 90.

An appeal should not be made to the inherent powers of the Court when there is a specific remedy provided by the statute.

Scope of the inherent powers of Court considered.

Per Tyabji J:—Order 21, rr. 89 and 90 being inapplicable to the case, the case has to be dealt with under the inherent jurisdiction of the court to which art. 166 would not apply but following the analogy of those rules and art. 166, the court should not exercise its inherent powers when there is no substantial injury or the party has been found guilty of laches by not applying within 30 days as required by art. 166.

Muthiah Chettiar v. *Bava Sahib* 605

——**Art. 179**—Dismissal of appeal for non-prosecution—Decree *nisi*—Limitation for enforcing the decree. *See Practice* 17

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Madras Act I of 1876—Regulation XXV of 1802—*Grant by Zamindar—Subject to payment—Permanent lease—Lessee not owner within the meaning of—Separate Registration—Liability for.*

A permanent lessee is not a transferee of proprietorship or owner within the meaning of Regulation XXV of 1802 or Act I of 1876 which is supplementary to the Reglation and is to be read with reference to it, so as to render the lands included in the lease liable to be separately registered.

Where a mokhasa tenure was resumed by the zamindar and the lands were re-granted subject to fixed annual payment.

Held, that the grant was in the nature of a permanent lease and the grantee was not liable to have the lands separately registered in his name.

Rajah of Vizianagaram v. *Collector of Vizagapatam.* (*Wallis C. J. and Kumarasami Sastri J.*) 278

——**I of 1914**—Retrospective operation—Bequest in favor of unborn persons—Validity of... 681

Madras City Municipal Act (III of 1904), S. 409—*Bye-law 169—Food—Meaning of—Drink "not included"—Aerated Waters—Unwholesome—Exposure for sale of.*

The word "food" in byelaw 169 framed under S. 409 of the City Municipal Act does not include "drink"; consequently a person cannot be said to violate that bye-law by exposing for sale unwholesome aerated waters.

Emperor v. *Ganapathi Aiyar* (*Ayling J.*) 732

Madras Civil Courts Act, S. 16—*Custom—Mahomedan Law—Mappillas—North Malabar—Applicability of Marumakkathayam Law—No presumption—Question of fact—Circumstances to be considered.*

The strict rules of Mahomedan law may be varied by proof of family custom or usage, the law to be administered by Courts being the law which the parties as a matter of fact by their customs and usages have adopted and not the law which either by a consideration of historical circumstances relating to the parties or of their religious books or otherwise, the Court should consider to be the law that they ought to have adopted.

Whether an alleged custom can be enforced at all or whether it is uncertain, irregular or unreasonable and as such ought not to be recognised is a question of law but the question whether the custom exists and if it exists, it applies to a particular person or set of persons is a question of fact to be decided in each case until it becomes so well understood that the Courts may take judicial notice of it.

It is erroneous to say that there is a presumption in the case of North Malabar Mappillas that they are governed by Marumakkathayam law as it is not a matter on which there could be a presumption.

Although if there had been a series of decisions holding concurrently that the community has adopted this system the Courts might have taken judicial notice of that fact, in the absence of such a series of decisions, the question remains in each case, a question of fact, whether the particular parties have adopted the one system or the other. In determining that question, various circumstances may have to be weighed on one side and

Madras Civil Courts Act—(*Contd*). PAGE.

the other, *e. g.*, that the parties being Mahomedans, there would be a tendency to follow the rules of Islam, that a great number of families as a matter of fact observe the Marumakkathayam law, the conduct of parties, &c.

Kunhambi v. *Kalanthar*. (*Tyabji and Spencer JJ.*) ... 156

Madras Estate Land Act (Act I of 1908), S. 3.—*Part of Estate—Owner of—Ejectment against tenant—Jurisdiction—Cognisable only by Revenue Courts.*

The owner of a portion of an estate is a landholder within the meaning of the Estates Land Act whether the part was severed before the passing of the Act or after and suits by him for evicting tenants can be brought only in Revenue Courts.

Chipurapalli Appayya v. *Sri Raja Ramachendra Raju* (*Wallis C. J. and Seshagiri Aiyar JJ*). 190

———, **S. 3 (2) d**—*Jurisdiction of Civil Courts—Inam Village—No presumption as to grantee not being owner of Kudivaram at the time of grant—Burden of proof.*

The party seeking to oust the jurisdiction of the ordinary Civil Court must establish his right to do so and there being no presumption that the person to whom an inam has been granted was not the owner of the kudivaram at the time of the grant, in the absence of any admission of the plaintiff or proof by the defendant that he did not own the kudivaram, the jurisdiction of the Civil courts would not be ousted.

Indsty Chinna Nagadu v. *Potu Kanchi Venkata Subbaya* (1910 M. W.N. 632) *Veerabadraya* v. *Sonti Venkanna* (24 M.L.J. 659) followed.

Jagannathacharylu v. *Kutumbarayadu*. (*Oldfield and Napier* JJ). ... 233

———, **S. 3 (2) d**—*Jurisdiction of Civil Courts—Grant of Agraharam—Presumption as to grantee being not owner of Kudivaram at the time of grant—Burden of proof.*

In deciding whether a village falls within the scope of S. 3 (2) d of the Madras Estates Land Act there is *ab initio* no presumption that the grantees were not possessed of the Kudivaram at the time of the grant. This must be proved by the party alleging it

The party who seeks to oust the jurisdiction of the Civil Courts must establish his right to do so.

Jagannathacharyulu v. *Kutumbarayudu* (27 M.L.J. 233) followed.

Papi Reddi v. *Peda Venkatacharyulu* (*Ayling and Napier JJ*). ... 567

———**S. 6**—*Landlord purchasing the tenant's interest—Tenant in possession, notwithstanding at the time of the passing of Act—Effect of—Rights of claimants to kudivaram inter se not affected by S. 6—Landlord precluded from acquiring tenant's interest.*

Where at the date of the coming into force of the Estate Land Act the defendant a ryot was in possession of the property though his interest had been purchased by the plaintiff the landlord for arrears of rent.

Held that S. 6 of the Estates Land Act conferred occupancy right on the defendant and the plaintiff could not evict him.

Madras Estate Land Act—(*Contd.*) PAGE.

Markappali Reddiar v. *Thandava Kone* (1914 M.W.N. 798). followed.

The right to the Kudivaram interest as between rival claimants thereto (other than the landlord who is debarred from claiming such interest) are not affected by S. 6, cl. 1.

Sivapada Mudali v. *Thyagaraja Chettiar*. (*Sadasiva Iyer & Hannay JJ.*). ... 665

——**Ss. 8, 183**—*Private land—Conversion of Jeroitii into Kambattam—Conversion—Evidence—Permissibility of—Private land—Meaning of—Acquisition of Kudivaram and letting as private land—Proviso and exception.*

Per Chief Justice : S. 8 of the Estates Land Act has not the effect of retrospectively imposing an absolute prohibition on the conversion of ryoti into private land not to be found in the definition or in the section dealing with the evidence as to what is private land. But a conversion of that kind should be proved by very clear and satisfactory evidence.

The fact that the Kudivaram rights in certain lands were acquired by the landlord and thereafter for a number of years he was letting out the lands as Kambattam without even cultivating them himself is not sufficient to effect such conversion.

Private land is held by the landholder as landholder and not a ryot.

Per Seshagiri Aiyar, J :—Land originally seri cannot become the private land of the landholder except in the one case mentioned in S. 185 *viz.*, when it is proved to have beem cultivated as private land by the landholder himself by his own servants or by hired labour &c. for 12 years immeditely before the commencement of the Act.

Meaning of the term *private land* discussed.

Proviso and exception distinguished.

Zamindar of Chellapalli v. *Rajalapati Somayya* (*Wallis C. J. and Seshagiri Aiyar J*) 713

——**Ss. 53 cl. (2)**—*Patta incorrect as to rent—Distraint for a larger amount than due—To be upheld to the extent claim valid.*

Having regard to S. 53 cl. (2), though the patta tendered is found to be incorrect as regards the amount of rent payable, the distraint ought to be upheld to the extent the claim is valid.

Raghunatha Row v. *Vellamoonji Gounden* (*Oldfield and Seshagiri Aiyar JJ.*) 597

——**S. 195**—*Plea that amount claimed is in excess of amount due only barred—Not any other plea as to maintainability of the suit.*

S. 185 of the Estates Land Act bars only the plea that the amount claimed is in excess of the amount due; it does not bar any other plea that the ryot may raise as to the maintainability of the suit.

Tender of Patta is not a condition precedent to suits for rent instituted after the coming into force of the Estates Land Act, though in respect of Fuslis before the Act.

Rajah of Karvetnagar v. *Govinda Mudali* (*Ayling & Tyabji JJ.*) ... 238

——**S. 212**—*Ryot in possession at the time of the passing of the Act—Decree in ejectment—Prosecution not liable to.*

A ryot in possession at the time of the Estates Land Act but against whom a decree in ejectment had been passed on the ground that he had no

Madras Estate Land Act—(*Contd.*) PAGE.

occupancy right and his tenancy had been terminated by notice to quit is not liable to prosecution under S. 212 for being in possession without the landlord's consent.

Appala Raju v. *Surapa Raju* (*Sankaran Nair* J.) ... 676

——**Sch. Part A, Art. 8**—*Limitation Act, Art. 110—S. 15—Suit for ascertainment of rent—Meaning of—Not confined to proceedings in Revenue Court—Interpleader suit as to right to collect cess—Pendency of—Injunction granted by first Court—Dismissal of suit by appellate Court—Effect of remand by High Court—Jurisdiction—Civil Courts —Extent of.*

The suit or proceedings for ascertainment of rent contemplated by the judgment of their Lordships of the Privy Council in *Rangayya Appa Rao* v. *Bobba Sriramulu* (1) and by Art. 8 (schedule to the Estates Land Act, Part A) are not necessarily suits or proceedings in Revenue Courts, but an interpleader suit brought by the tenant making the Government and the landlord parties to ascertain which of them is entitled to collect water cess from him is not such a suit or proceeding.

The fact that in any such suit or proceeding an alternative claim for rent could have been made does not affect the question.

The jurisdiction of the Civil Courts is not taken away in regard to claims for rent except in so for as there is special exclusion contained in any enactment.

Injunction granted by the decree of the first Court is dissolved by the decree of the appellate Court dismissing the suit and is not revived by the order of the High Court in second appeal remanding the suit to the appellate Court for fresh disposal.

The period during which there was no injunction restraining a suit could not be deducted even though the decree cancelling the injunction was set aside by the appellate Court.

Where a patta contained a term extending the period for the payment of rent by two months beyond the expiry of the fusli and no objection was made thereto by the tenant.

Held, that limitation would commence to run only from that time and not from the end of the fusli.

Doraisami Reddi v. *Venkatachalam Pillai*, ... 734

Madras Local Boards Act, S. 51—*Right of suit—Local Boards—Trust—Powers transferred by Board of Revenue—Scope of—Management as well as superintendence—Suit for recovery of trust property—Maintainability of.*

The local body to which the powers of the Board of Revenue in respect of a trust are transferred under S. 51 of the Local Boards Act, is invested with the rights of management as well as superintendence and in the absence of trustees entitled to sue, may maintain a suit for the recovery of the trust property.

The Municipal Council of Rajahmundry v. *Susarla Venkateswarulu Chairman* (31 M. 111), followed.

Buchi Reddi v. *President of the Taluk Board of Guntur* (*Ayling and Tyabji JJ*). 284

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Madras Regulation XXV of 1802—Whether permanent lessee under Zamindar liable to be separately assessed. *See* Madras Act I of 1876 278

———**Rent Recovery Act (VIII of 1865)**—*Landlord and Tenant—Varam patta—Duty to cultivate in due season—Utilisation of portion of nanjai holding as seed bed—Propriety of—Liability to be charged for—Burden on landlord to show the impropriety of.*

Prima facie, utilisation of a reasonable portion of a nanjai holding as *natankal* is a proper use of the land and unless the landlord can show that the land was wrongly used as such or that the ryot might and ought to have grown a crop on the same plot after removing the seedlings, he cannot charge the tenant for not cultivating it.

Ramakrishnam Pillai v. *Robert Fishcher* (*Miller J.*) ... 414

———**Rent Recovery Act**—*Patta—Varam—Condition to cultivate in due season—Propriety of—Breach of—Measure of damages—Yield of the neighbouring land.*

A condition in a Varam Patta obliging the tenant to cultivate the land in due season is not unreasonable and the proper measure of damages in case of failure to observe the condition is the yield of the neighbouring land.

Seetharama Iyer v. *Robert Fischer* (*Miller J.*) 415

———**Rent Recovery Act, Ss. 11 cl. 3 and 69**—*Appeal to High Court from Zilla Judge's Court—Act VIII of 1859, S. 372—Concurrent finding of fact by two lower courts binding on High Court—Civil Procedure Code* (*Act XIV of* 1882), *Ss.* 584 *&* 585.

In a suit under S. 9 of the Rent Recovery Act by the landlord for the acceptance of an Asara Patta by his tenants, alleging that though there was an arrangement between him and his tenants in Fasli 1283, for the substitution of Veesabadi or money system for the Asara or produce sharing system, he was reserved liberty to charge wet rates if wet crops were raised on the land and that as wet crops had now been raised, he was entitled, in the absence of any agreement as to the rates leviable to revert to the Asara system, the tenant—defendants contended that the arrangement was intended to be permanent and that the landlord was not entitled under any cicumstances to revert to the Asara system. Both the Collector and the District Court in appeal held that the arrangement was intended to be permanent and dismissed the suit. On second appeal being presented to the High Court, the High Court held that the terms of the arrangement as contained in the written muchilikas gave the landlord power to charge an enhanced rate in case there was wet cultivation and as such there was no contract within the meaning of S. 11 of the Act in respect of wet crops and the landlord was entitled to revert to the Asara system in respect of them.

Held, on appeal to the Privy Council that the finding of the Collector and the District Court as to the arrangement of 1283 being permanent was one of fact and as that finding was not based merely on the construction

Madras Regulation Act.—(*Contd.*) PAGE.

of the muchilikas, the High Court had no power in second appeal to interfere with it.

As however the decree of the Collector dismissing the suit was wrong, their Lordships remitted the case to him to make the proper decree.

Held, further, that though no provision is made in the Rent Recovery Act for appeals from the decrees of the Zilla Judge in appeal from the Collector, having regard to the general right of appeal from the decrees of the Zilla and District Courts given by S. 372 of Act VIII of 1859 and S. 584 of Act XIV of 1882, a second appeal lay to the High Court.

The judgment of the High Court in *Venkata Narasimha Nayudu* v. *Kasarane-Chinna Bapayya* I.L.R. 33 M. 12 reversed.

Appa Row v. *Narasayya* (20 M.L.J. 596), *Musammat Durga Chowdrain* v. *Jawahir Singh Chauduri* (17 I.A. 122) *Veeraswamy* v. *Manager Pittapur Estate* (26 M. 518), approved and followed.

Ravi Veeraraghavulu v. *Sri Raja Venkatanarasimha* (*Mr. Ameer Ali P. C.*) 451

Mahommedan Law—Shia School—*Nikka—Muta—Legitimacy—Presumption—Evidence—Limitation bar to claims of some co-heirs—Benefit not to the other co-heirs.*

Where a Mohammedan of the Shia School had contracted a Muta marriage with a woman and had several children by her, of whom two daughters were alive, and afterwards married her by nika and had a daughter by her who claimed ⅜ of the entire estate of her father.

Held, that she was only entitled to ⅓ of ⅜ inasmuch as according to Shia law the two other daughters of the deceased father born during the continuance of the Muta were also legitimate and entitled to an equal share with her.

Held, further that when cohabitation is proved after Muta, the presumption is in favour of its continuance, although Muta Marriage (a temporary marriage, the duration of which is fixed by agreement between the parties) as such does not confer on the wife any right or claim to inherit from her husband, where some of the heirs are barred, the benefit of it should go to the party in possession and not to the other heirs.

Sorharat Singh v. *Musammat Jafri Bibi.* (*Lord Parker*) (*P.C*). ... 89

Maintenance—Allowance to a person and his lineal descendants—Legality of 656

Malabar Law—Karnavan—*Melcharath—Granted before expiry of Kanom—Necessity or benefit to be shewn,*

A melcharah granted by a Karnavan before the expiry of the term of the kanom cannot be supported unless there was adequate necessity or the grant is shown to be for the benefit of the Tarwad.

Raman Nambiar v. *Raman Nambiar.* (*Sadasiva Aiyer and Tyabi JJ.*) 175

———*Melcharath—Grant before expiry of lease—Validity of—Successor not bound.*

In the absence of necessity a melcharath given before the expiry of the prior lease will not bind the succeeding karnavan whether the grantor was or was not alive at the time the prior lease expired.

Moidin Kutti v. *Kunhi Koyan* 691

Malabar Law.—*Contd.* PAGE

———*Melcharath—Before the expiry of prior lease—not binding.*

A melcharath given by a karnavan two years before the expiry of the prior lease is invalid in the absence of necessity and cannot bind the succeeding karnavan.

Cheria Chirikandan v. *Krishnan Nambiar* 690

———Mappillas of North Malabar—Marumakkathayam Law applicability of—No presumption—Question of fact. *See* Madras Civil Courts Act, S. 15. 156

Mesne profits—Refusal of as against widow entitled to maintenance in the absence of offer of maintenance. *See* Hindu law, family custom... 373

Minor—Alienation by grandfather—Consent of guardian to avoid partition—Validity. *See* Hindu law 485

———*Ex parte* decree against—Sale in execution—Cannot be set aside without proving negligence of guardian. *See* Trusts Act, S. 90 ... 213

Mistake evidence—Instances of other mistakes—Admissibility. *See* Registration 80

Mitakshara—Inheritance—Bandhus—Whether classes can be added to *See* Hindu law 333

Money Lender—Meaning of lending—Transactions to be numerous continuous and systematic. *See* District Municipalties Act ... 231

Mortgage by Pardanashin lady to her legal adviser—Clause for substituting properties—allotted at partition to mortgaged properties—Validity of. *See* Pardanashin lady 13

———*Relationship of mortgagor and mortgagee—Tender or deposit—No cessation by—Court Fees Act, S. 7, cl. XI (cc)—Suit under—Title cannot be gone into.*

In a suit brought under S. 7, Cl. XI (cc) of the Court Fees Act paying Court fee upon one year's rent, the Court cannot go into title and give a decree on that footing.

By the mere fact of a valid tender or deposit the relationship of mortgagor and mortgagee does not cease and as such the fact of such tender or deposit is no defence to a suit by the mortgagee for the recovery of possession brought against the mortgagor who is in possession under a lease from him.

Satyabadi Behara v. *Harchati* (I. L. R. 34 C. 223) *Rukmani Bai Venkatesh* (I. L. R. 31 B. 527) relied on.

Balasidhantam v. *Perumal Chetti.* (*Seshagiri Aiyar J. and Kumarasami Sastri, JJ.*) 475

———what constitutes a document a mortgage deed within the meaning of S. 31 cl. (1) Limitation Act. *See* Limitation Act, S. 31 ... 58

———**Mortgagee**—*Right to pay and claim credit for cesses on land—Government Revenue—Revenue due on other lands included in the same putta, Revenue on mortgaged lands—Revenue Recovery Act II of 1864, S. 42—Transfer of Property Act, Ss. 72 (b) 76 (c)—Sale for arrears of cess—Free of incumbrances.*

Mortgagee.—(*Contd.*) PAGE.

A sale of land for arrears of water-cess, land-cess and Village Cess would have the effect of extinguishing prior encumbrances and so a mortgagee is entitled to pay the cesses both under Ss. 72 (b) and 76 (c) and take credit for the same.

Government Revenue due upon other lands contained in the same patta issued in the mortgagor's name is revenue due upon the mortgaged land also ; *Secretary of State for India* v. *Pisipate Sankaraiyer* (I. L. R. 34 Mad. 498 : 20 M. L. J. 794) ref.

Cesses accruing due in respect of the mortgaged property form part of Government Revenue and the mortgagee is bound to pay them in the absence of a contract to the contrary.

Gunnam Dorayya v. *Vadapalli Ayyama-Charyulu.* (*Sadasiva Aiyar and Napier, JJ.*) 295

———Mortgagee holding two mortgages—Suit and sale on one of the mortgages subject to the other—Trusts Act, S. 90—Transfer of Property Act, Ss. 67, 99—Whether contravened. *See* Trusts Act, S. 90 ... 213

———*Redemption—Right of the mortgagor to redeem before the expiry of the term.*

Having regard to the judgment of the Privy Council in *Bakhtawar Begam* v. *Husaini Khanum* (26 M. L. J. 474), in the absence of a contract to the contrary, a mortgage cannot be redeemed before the expiry of the term mentioned in the deed.

Observations in *Rose Ammal* v. *Rajaratna Ammal* (I. L. R. 28 M. 33), held to be overruled.

Bir Mohamad Rowther v. *Nagoor Rowther.* (*Sadasiva Aiyar and Napier, JJ.*) 483

Mutual mistake—Rectification—Amendment. *See* Registration ... 80

Nattukkottai Chetties—Trade assets—Family property—No difference between 654

Navigable river—Grant of several fishery in—River changing course—Right to fish. *See* Jalkar 449

Next friend—Death of—Suit dismissed in consequence—Nullity. *See* C. P. C. Ss. 10, 11, 151... 405

Non-prosecution—Dismissal of appeal for—Mortgage decree—When time begins to run. *See* Limitation Act, S. 4 1

Order in Council June 13, 188 Rule 5—Dismissal of apppeal for non-prosecution—Mortgage decree—When time begins to run. *See* Limitation Act, S. 4 1

Pardanashin lady—*Deed—Execution—Formalities for validity—Relationship of client and legal adviser—Clause for substituting properties allotted at partition for mortgaged property—Validity of—Knowledge of relations—Sufficiency of, to discharge burden.*

Held : Where the legal adviser of a Pardanashin lady acts the part of a money-lender to his client and procures the execution by her of a mortgage bond to secure its repayment, the Court is entitled as well as bound to examine the transaction with closer scrutiny than ordinarily and to insist

Pardanashin lady.—(*Contd.*) PAGE.

sternly on the mortgagee showing clearly that his client was fully aware of the meaning and effect of the deed and that the transaction was a fair and honest one.

Where there was a clause in a mortgage deed that after partition between the mortgagee and her co-sharers, the property allotted to her at the partition should be substituted for the mortgaged properties as security.

Held, that if the mortgage was otherwise valid, the clause would have been legally operative and subjected the whole of the lady's share to the mortgage.

Quaere, if the fact that the relatives of the lady must have been aware of the transaction is sufficient to support the deed in the absence of evidence that the transaction was explained to the lady and its legal effect was clearly understood by her.

Lala Mahabir Prasad v. *Mussamat Taj Begam* [*Lord Moulton* (*P.C.*)]. 13

Parties—Whether infants necessary parties in a suit to recover custody of infants. *See* Hindu Law, Guardianship 30

————Alienees from trustees—Whether necessary or proper parties to a suit under S. 92, Civil Procedure Code. *See*. C. P. Code, S. 92 ... 266

Partition suit—*Judicial—decree—Parties—Knowledge of one without being a party—Acquiescence—S. 244 of Civil Procedure Code of* 1882.

Where partitions had taken place of a patni talook and the last of the co-sharers brought a suit to claim his proper share stating that the various partitions had the effect of awarding the other co-sharers more than their proper shares, at his expense.

Held, that the partitions being by judicial decrees made against him the matter was *res judicata* inasmuch as in all partition suits one co-sharer who desires partition has to make other co-sharers defendants and the award is to be made by a judicial decree and the award so made could only be rectified under the provisions of the Civil Procedure Code and that no irregularity being pointed out it was *res judicata* also as between co-defendants.

Nalini Kanta Lahiri v. *Sarnamoyi Debya and others* (*Lord Moulton*) (*P. C.*) 76

————Compromise—*See* Registration Act, S. 17 656

Partnership—*Suit for dissolution of—Duty to produce accounts—Accounts taken in the absence of—Application for discovery refused—Propriety of—Reference by surviving partners—Binding nature of—Acquiescence in the benefits of—Damages for improper reference—Difference between amount payable under award and amount claimed, awarded as damages—If justifiable.*

For the purpose of working out a partnership decree, each party to the action is bound to produce and discover all documents in his possession relating to the partnership and where partnership accounts had been taken in the absence of such accounts, plaintiff's application for discovery having been refused their Lordships upheld the order of the High Court directing accounts to be taken afresh after production of the accounts.

Partnership.—(*Contd.*) PAGE.

Held, however, that the question whether the legal personal representatives of a deceased partner were bound by a reference by the surviving partners in relation to a partnership contract was not a pure question of law to be decided without reference to the facts of the case and the High Court was in error in permitting the question to be raised for the first time in appeal. The contract which was not in evidence might have contained a submission binding on the representative; even if it did not and the agreement to refer was not orginally binding it might have become binding on them by their acquiescence therein or their acceptance of benefits thereunder.

Held, further that assuming the agreement to refer was not binding there was no justification for the Court giving relief on the footing that the agreement was binding but was negligently and improperly entered into and awarding as damages the difference between the amount originally claimed and the amount payable under the award, throwing the onus of proving that it was any less sum on the partners that improperly joined the reference.

Rai Dwarka Nath Sarkar Bahadur v. *Haji Mohamed Akbar.* [*Lord Parker of Waddington* (*P.C.*)] 192

Patents infringement of—Defences open. *See* Invention and Design Act 573

Patni Regulation (VIII) of 1819, Ss. 8, 11, 11 (2) & 11 (4)—*Bengal Tenancy Act,* (*VIII*) *of 1885, Ss. 65, 66 & 148, Cl.* (*h*) *&* 195—*Landlord and tenant—Continuance of relationship.*

Where a landlord transferred his interest in the Zamindari reserving only the right to recover the arrears of rent from the Patnidar and in execution of the decree which he subsequently obtained for the same, sought to sell the tenure under S. 65 of the Bengal Tenancy Act free of the under tenures.

Held, that S. 65 of the Bengal Tenancy Act applies only to cases where the relationship of landlord and tenant exists both at the date of the decree and when the decree is sought to be executed.

Held further, that the Patni Regulation of 1819 being a self-contained enactment expressly excluded from the operation of the Bengal Tenancy Act the right of the decree-holder under the latter Act could not prevail against the special lien created in favour of a Darpatnidar who had paid up the subsequently accrued arrears due to the transferee and taken possession of the tenure under the provisions of that Regulation.

Arthur Henry Forbes v. *Maharaj Bahadur Singh* [*Mr. Ameer Ali* (*P. C.*)] 4

Pensions Act, S.4—*Land granted as Desai inam to manager of joint family Presumption for family—Suit for partition—Maintainability without certificate—Jurisdiction—Civil Courts.*

Where land has been granted as inam to the managing member of a joint Hindu family he must be deemed to have taken the property for and on behalf of the family. *Gunnaiyan* v. *Kamakshi Iyer* (I. L. R. 26 M. 339) followed.

The Pensions Act has no application to a suit, among the members of the family of the grantee of the Inam for partition of the land granted as

Pensions Act.—(*Contd.*) PAGE.

Inam and the Civil Courts have jurisdiction to entertain the suit without a certificate under the Pensions Act.

Panchanada v. *Neelakanta* (7 M. 191) *Jeyambha* v. *Secretary of State for India* (23 M. L.J. 687) *Secretary of State* v. *Subbarayudu* (36 M. 559) *Ravji Narayan Mandlik* v. *Dadaji Bapuji Desai* (1 Bom. 523) *Mannu Lal* v. *Fazal Iman followed* (33 A 580) *Rama* v. *Subba* (12 M. 98) distinguished.

Desayi alias Allam Kaju Nanjunadiah v. *Desayi alias Allam Raju Venkatasubbiah.* (*Seshagiri Aiyar and Kumarasami Sastri JJ*) ... 618

Possession—*Title deeds—Conveyances—Complete devolution—Description of lands found consistently in deeds—Registered deeds.*

Where the plaintiff claimed a certain portion of land and produced duly registered conveyances, mortgages, reconveyances, and other title deeds extending over a period of 50 years, and also proved that during the period had leased portions of land by leases that were registered.

Held: that there was no reason to consider the documents produced as not being plaintiff's title deeds and clear title being proved plaintiff should succeed.

Held also that the description of the parcels which were to be found consistently in the deeds must be followed in fixing the boundary.

John King and Co. Ltd. v. *Municipal Commissioners, Howrah* [*Lord Moulton* (*P. C.*)] 20

Practice—*Dismissal of appeal for non-prosecution—No decree—Limitation Act of* 1877 *Art.* 179.

Where an appeal to the Privy Council from a judgment of the High Court confirming an *order nisi passed* in a mortgage suit was dismissed for non-prosecution :

Held, that the order dismissing the appeal for want of prosecution did not deal judicially with the matter of the suit and could in no sense be regarded as an order adopting or confirming the decision appealed from and that therefore, the position was as if there had been no appeal at all.

Held, further that the period of Limitation for the enforcement of decree of the Lower Court was 3 years as prescribed by art. 179 of the ...n Limitation Act 1877.

...*eld*, also that inasmuch as the right to enforce the decree had been ...efore the passing of the new Civil Procedure Code did not operate ...t.

...*ri Abdul Majid* v. *Jewahir Lal.* [*Lord Moulton* (*P.C.*)] ... 17

...rden of proof—Interference—Second Appeal. *See* Religious ...nt 253

... point of Limitation for the 1st time before the P. C. ...t Debtors Act 150

...uisition of rights by caste—Pathway—Customary right ...escription, distinguished. *See* Caste 110

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Presidency Insolvency Act, Ss. 7,36, 108—*S. 36, a section relating to discovery—Not to be used for adjudicating rights as against strangers—Benami—Orders may be made against strangers under S. 7—Applicability of S. 7 to administration proceedings under S. 108.*

S. 36 of the Presidency Insolvency Act is a section relating to discovery and cannot be used for adjudicating the rights of the estate as against third parties in respect of properties which stand in their name and *prima facie* belong to them on the ground that they are held benami for the insolvent.

Obiter: Such an order could have been made under S. 7.

Semble S. 7 is not applicable to proceedings to administer a deceased debtor's estate initiated under S. 108. *Exparte Hama* v. *Walter* (15 Q. B. D. 159), followed.

Sornammal v. *Official Assignee Madras* (*Sir Arnold White C.J. and Oldfield, J*). 66

Presumption—Money in the hands of ejaman of an Aliyasantana family is family property *See* Aliyasantana Law 60

Principal and Agent—*Contract Act, Ss. 195, 226, 230—Parol evidence to show party to be only agent—Admissibility of—Exclusive credit given to agent—Effect of—Maintainability of suit by principal—Special agreement excluding right to sue—Dubash—Position of—Sub-agent—Equitable set off.*

The defendants were Dubashes under the late Arbuthnot and Co., and had deposited Rs. 50,000 as security for the due performance of contracts entered into through them. Under the contract of agency, defendants had bound themselves not to transact business for any firm other than the Arbuthnots. The Arbuthnots transferred the business in connection with which the defendants were mainly operating, to the present plaintiffs. Nevertheless as they were the managing agents of the plaintiffs, the transactions were carried on as before without any change in the wording of the contracts between them and the defendants.

Held, Per Officiating Chief Justice:—That the proper inference from the facts was either that the defendants were only sub-agents with whom the plaintiffs had no privity of contract or that though the Arbuthnot and Co. acted as agents of the plaintiffs, there was special agreement between the parties disentitling the plaintiffs from suing upon the contract and in either view, plaintiffs were not entitled to maintain an action upon the contracts entered into by the Arbuthnots with the defendants, but that if the plaintiffs could sue upon the contracts, the defendants being aware that the Arbuthnots were acting as plaintiffs' agents and for there ben fit were not entitled to plead that the amount of their deposits should equitably set off against the suit liability.

Per Seshagiri Aiyar, J.—That the Arbuthnots and defendants contracting as independent parties and as such the plaintiffs could [illegible] them but even if they could, defendants being unaware of the term contract between the plaintiffs and the Arbuthnots they could [illegible] subject to equities *viz.*, the duty to give credit for the 50,000 Rs with the Arbuthnots.

Principal and Agent—(*contd.*) PAGE

Per Officiating Chief Justice :—Parol evidence is not admissible to show that a person who has signed a contract in his own name acted only as agent and therefore could not sue or be sued upon it.

Per Seshagiri Aiyar J : The question whether one of the contracting parties was acting for himself or on behalf of his principal does not relate to the terms of the contract.

Per Officiating Chief Justice : Whereas under the English Law, the fact that exclusive credit was given to the agent is a defence to the action by the principal, under S. 226 the principal would be entitled to sue in the absence of a special agreement disentitling him to sue. Such an agreement can be proved notwithstanding the absence of the words "in the absence of a contract to the contrary" in that section.

Per Seshagiri Aiyar J : *Prima facie*, a contract by a person in his own name without more is a contract by him as principal and a stranger cannot enforce it. There is nothing in S. 230 of the Indian Contract Act which makes a departure from the English Law. That section is not exhaustive of the rules of evidence.

Position of *Dubashes* generally considered.

The South Indian Industrials Ld. v. *Murdi Rama Jogi* (*Wallis, C.J. and Seshagiri Aiyar, J.*) 501

———Contract Act, Ss. 195, 226, 230 Parol evidence to show only agent —Admissibility—Exclusive credit given to agent—Effect of ... 501

———Maintainability of suit by principal, special agreement excluding 501

Probate and Administration Act, Ss. 4, 90. 149, vesting—Alienation by Administrator-General—Transfer by heir—Priority. *See* Administrator General's Act 400

Procedure—Suit or appplication proper form—Guardians and Wards Act, *See* Hindu Law 30

Promissory note—*Karnavan of Malabar Tarwad—Execution in his own name—Not as Karnavan—Description in the body of the instrument as Karnavan—Suit on note by indorsee—Liability of Tarwad property.*

Where, though in the body of a promissory note the maker is described as the Karnavan of the defendants' tarwad the note is signed by him in his own name and not as Karnavan of the tarwad and the suit is brought on the note and not on the original cause of action, the tarward property in the hands of the defendants cannot be made liable.

Krishna Aiyar v. *Krishnaswami Aiyar* (I. L. R. *23 M. 597*) distinguished.

(*Wallis, C.J. Ayling & Seshagiri Aiyar JJ.*) 595

Privy Council Practice —Concurrent finding of fact by lower courts. *See* Bengal Land Revenue Sales, Act XI of 1819 365

Putra Poutradi Krame—When words of limitation and not of general inheritance. *See* Hindu Law—Family custom 373

Ratification—Mutual mistake—Amendment. *See* Registration ... 30

Registrar—Jurisdiction to register document when only porperty within jurisdiction fictitious or non-existent. *See* Registration ... 30

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Registration—*False entry of property in a mortgage—Inclusion to obtain jurisdiction of the Calcutta Office of Registry and the Calcutta High Court—Fraud on Registration law—Suit on mortgage decree for rectification—Property of—Territorial jurisdiction—Erroneous decision upon, cannot enlarge jurisdiction—Practice—Concurrent finding—No evidence to support—Court of law—Description of house property—Number and street—Primary description.*

Where property described as No. 25, Gurudas Street, Calcutta within certain boundaries was included in a mortgage of properties situate in the mofussil and it was found that there was no such property as No. 25, Gurudas Street and that the property situate within the given boundaries at no time belonged to the mortgagor but the High Court in a suit upon the mortgage to which the contesting defendants were not parties had held that the insertion of No. 25 Gurudas Street was a mistake for No. 25 Ashutosh lane (which also belonged to others) and as such had jurisdiction and had given a decree on the mortgage at the same time directing however, an amendment of the description of the property given in the mortgage.

Held, that the case was not one for rectification at all and even if otherwise, the Court could not order rectification when there was no prayer for the purpose and the question was not properly before the Court.

That an erroneous decision by the Court that it had jurisdiction could not enlarge its limited territorial jurisdiction so as to bind persons who were not parties to the suit.

That the case might be viewed either as one in which non-existent property had been mortgaged or as one in which the parties had made a fictitious entry in order to give the deed the appearance of relating to property situate in Calcutta and therefore within the jurisdiction of the Calcutta Sub-Registrar and the Calcutta High Court ; in either view both the registration and the decree were wholly without jurisdiction and invalid.

An entry intentionally made use of by the parties for the purpose of obtaining registration in a district where no part of the property actually exists is a fraud on the registration law and no registration obtained by that means is valid. The same considerations apply to the jurisdiction of the Court in respect of the deed and such fictitious item is totally ineffective to bring the deed within the jurisdiction of the Court which would not have had jurisdiction but for such entry.

The proper description of houses in towns for the purpose of registration is by the street in which they are situated and the number which they bear in that street and that is the description to which one should primarily look in identifying the property.

Held also, that the principle of concurrent finding did not apply to the finding of the lower Courts that the entry was due to a mistake as there was no evidence to support the finding.

Harendra Lal Roy Chowdhuri v. *Srimati Hari Dasi Debi.* [*Lord Moulton* (*P. C.*)] 80

Registration—(*contd.*) PAGE

——— **Act, S. 17**—Compromise—Suit for partition 656

———*Compromise petition—Recital of release of rights in family property—Admissibilty of.*

A compromise petition reciting an actually effected release of the rights of a co-parcener in the family property is admissible in evidence to prove the release though not registered.

Bindesri Naik v. *Ganga Saran Sahu* (I. L. R. 20 A. 171) *Natesa Chetty* v. *Vengu Nachiar* (I. L. R. 33 M. 102) followed. *Chellamma* v. *Rama Rao* (I. L. R. 36 M. 46), referred to.

Sellapa Gounden v. *Gurumurti.* (*Miller* and *Sankaran Nair JJ.*)... 396

Release—Construction—Whether it can operate as transfer ... 694

Religious Endowments—*Hindu Temple—Right of worship—Agamas—Right of entry of Sudras into the temple—Burden of proof—Custom for exclusion to be made out—Practice—Second Appeal—Decision on burden of proof—Interference in.*

In a suit by the representatives of Ilaivaniyar community in the village of Panakudy against the Brahmans, Mudaliars and Pillai's in that place for a declaration that they had a right to go as far as the Garbhagriham for acts of worship in the village temple plaintiffs adduced evidence to show that their right of entry into the hall was recognised in several important temples of Southern India and though the Court below believed that evidence for the plaintiffs, nevertheless it dismissed the suit on the ground that that was insufficient to make out the plaintiff's right of entry to the plaint temple.

Held: that the Court below erred in holding that the burden was on the plaintiffs to show that they had the right of entry or were not excluded on the other hand, as they belonged to one of the sub-divisions of the Sudra community, under the Agamas that regulated the temple rituals they were entitled to be in the Mahamandapam or outer hall and it therefore lay on the defendants to prove that by reason of any custom they were prevented from going beyond the Dhwajastambha.

In this view, the defendants having failed to make out a custom excluding the plaintiffs their Lordships felt justified in second appeal in giving a decree to the plaintiffs subject to the right of the defendants to stand in front of them.

Gopala Muppanar v. *Subramania Aiyar* (*Sadasiva Aiyar and Tyabji JJ*). 253

——— **Muhammadan Law**—*Right of suit—Worshippers suit by, for possession—Mosque.*

The worshippers of a Mosque cannot whether in their individual or in their collective capacity maintain a suit for possession of the properties belonging to the Mosque.

Kamaraju v. *Asanali Sheriff* (I. L. R. (23 M. 99) followed.

Mahammad Sahib v. *Karim Bibi Ammal.* (*Sadasiva Aiyar and Napier JJ*). 270

———*Shebaitship—Hereditary office—Possession—Hindu Law—Widow—Mortgage of income from offers by—Sales in execution—Suit to set aside by widow—Dismissal of—Res judicata—Limitation Act, art. 124—Receipt of income, not possession of office—By person not shebait*

Religious Endowments—(*Contd*) PAGE

—*Actionable wrong—C. P. C, Old Code, S. 244—Suit to set aside a decree not within:*

Where in execution of a decree upon a mortgage executed by a Hindu widow who was the shebait a of temple, the defendant purchased 3½ as share of the daily surplus income to which she was entitled in her right as such shebait from the offerings to the temple and was found to have been in receipt of the same ever since though not being a Brahmin, he could not perform the Pooja which was being attended to as heretofore by the widow and a suit to set aside the decree and the sale on the ground of fraud brought by the widow was dismissed barred by s. 244 C. P. C. on the death of the widow a fresh suit being instituted by the reversioner to recover possession of the income which was dismissed by the High Court both on the ground of limitation under art. 124 of the Limitation Act and *res judicata* by reason of the decision in the previous suit by the widow.

Held that the decision in the suit brought by the widow did not operate as *res judicata.*

(2) That it was also not barred by limitation. The suit was not one for possession of an hereditary office. The right to the office did not arise from or depend upon the receipt of the share of income although the right to receive the income was attached to and dependent upon the possession of the right to the shebaitship. By adversely taking and appropriating to his own use a share of the surplus income defendant acquired no rights or title to the share of the income and on each occasion upon which he received and wrongfully appropriated a share of the income he committed a fresh actionable wrong in respect of which a suit could be brought but it did not constitute him a shebait for the time being or affect in any way the title to the office.

S. 244 C. P. C. cannot apply to a suit which in effect is brought to set aside the decree on the ground of fraud.

Bahajaii Thakur v. *Jharula Das.* [*Sir John Edge* (*P. C.*)] ... 100

————*Temple—Dharmakarta—Power to dismiss—Vritikar—Vriti for reciting Veda,—Sex, ignorance of Veda and minority if disqualification—Inam granted by Zamindar and confirmed by Government. Not resumable by temple trustees—Right of resumption in Government.*

The trustees have no power to resume an inam granted to certain Vritikars of the temple for reciting the Veda when the inam is not one granted to the temple but was granted to the Vritikars themselves conditional on their performing the service by the Zamindar and was confirmed by the Government, the right of resumption *prima facie* being in the Government.

Whether the trustees could dismiss the Vritikars is a question to be determined upon the evidence in the case and not a matter for assumption.

It cannot be assumed that a minor, a female and a person unlearned in the Vedas would lose the right to the service in the temple; services being often performed by proxies, the onus would be on the Dharmakartas to show that those are disqualifications.

Tangirala Chiranjivi v. Raja Manikya Rao. (*Benson and Sundara Aiyar, JJ.*) 179

Religious Endowments—(*contd.*) PAGE

———**Act, S. 18**—*Sanction given to two persons—Suit by one alone—Maintainability of.*

Where sanction is given under S. 18 of the Religious Endowments Act to two persons one of them alone cannot sue without getting the sanction amended.

Venkatesha Malai v. *Ramampalli Ramayya* 241

Res judicata—*Minor—Guardian—Gross negligence of—False plea of adoption and neglect to set up right under will—Decree not binding against minor—Hindu Law—Widow—Decree in favour of as representing estate—Suit by reversioner against—Not res judicata*

A minor is not bound by a decree passed against him if he is able to show that his guardian was guilty of gross negligence.

Where the guardian deliberately setting up a false plea of adoption, neglected to put forward the rights of the minor under a will of which he was aware.

Held, that a decree obtained under those circumstances against the minor would not operate as *res judicata* against him.

Held : Per Spencer J :

A judgment in favour of the widow as representing the estate of her husband against a stranger will not operate in favour of the reversioners suing her so as to preclude her from setting up that she was entitled to the estate of her own right under a will of the husband.

Ashar Reza Khan v. *Mahomed Mehdis Hossein Khan* I. L. R. (30 C. 556 P. C.) foll.

Gotepatti Subban v. *Gotepatti Nurasamma* (*Sankaran Nair & Spencer JJ*) 486

—— —Sale in execution of decree against widow—Suit by widow to set aside decree—Suit subsequently by reversioner. *See* Religious Endowments. 100

————Principles of Boundaries Act, XXVIII of 1860, Findings of the boundary settlement officer, whether *res judicata*. 529

————prior decisions in partition suits acquiescence. *See* Partition suits. 76

Resumption by Trustee—Inam granted by Government to person for Temple Service right to *See* Inam. 57

Revenue Sale—Sale of estate for arrears of Revenue—Nature of interest acquired by purchaser. *See* Beng. Revenue Sale Act... ... 359

Revocation of charitable trust after it was completed—Validity. *See* Dedication 582

Right of suit—Mosque—Whether worshippers can maintain a suit for possession of. *See* Religious Endowment 278

Sapindaship—Mutuality of—Essential for heritability. *See* Hindu law Mitakshara 334

Second Appeal—Burden of proof—Interference—Practice. *See* Religious Endowment. 253

————Concurrent finding of fact—Civil Procedure Code Act XIV of 1882—Ss. 584 and 585—Act VII—of 1859, S. 372. *See* Rent Recovery Act (Madras) 451

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Separate assessment—Whether permanent lessee liable to—Madras Act I of 1876, Regulation XXV of 1802. *See* Madras Act I of 1876 ... 279

Sonthal Parganas—Mortgage—*Law relating to usury—Special Legislation—Act XXXVII of* 1855—*Sonthal Parganas Settlement Regulation of* 1872, *cl.* 2, *Ss.* 4,5,6.—*Act VI of* 1872—*Notification by Local Government—Act XIV of* 1874—*Sonthal Parganas Justice Regulation Act of* 1893 *Pt.* 2—*Jurisdiction—Revenue Officer's Court—Suits relating to land—Interpretation—Natural signification—Protective section—Practice—Point relating to jurisdiction raised in the first Court and at the Privy Council.*

A mortgage for Rs. 2,85,908,-1-9 was created on lands the bulk of which was situate in the Sonthal Parganas by the appellant mortgagors who lived there, the interest being 7½ per cent. per annum with annual rests. There was a stipulation in the bond that the mortgage might be enforced in the Bhagalpore Court. By Act XXXVII of 1855 the Sonthal Parganas were placed under special legislation more suited to the uncivilised race of people called Sonthals. It however provided that all civil suits in which the matter in dispute shall exceed the value of Rs, 1,000 shall be tried and determined according to the General Laws and Regulation in the same manner as if that Act had not been passed. By Act VI of 1871, Bengal Civil Courts Act, certain Courts were established which had jurisdiction to try matters in dispute which exceed Rs. 1,000 in value. By the Sonthal Parganas Settlement Regulation 1872, the Lieut-Governor of Bengal was given the power to invest any competent officer with the powers of any Civil Court established under Act VI of 1871 and to exclude the whole or any part from jurisdiction of the Civil Courts. By S. 5 it provided that no land nor rent nor profits, nor interest in or arising out of any land etc. would be amenable to the jurisdiction of Civil Courts but could only be tried by the officer appointed under Act XXXVII of 1855 S. 2 or by the Settlement Officer under the Settlement until the settlement, was declared to be complete by a notification in the Calcutta Gazette. By S. 6 no compound interest was to be decreed, nor was the interest to be more than 25... on loans for a year, nor could interest exceed the principal of the original debt or loan. The District in which the suit lands were situate was in the course of settlement and no notification had been made declaring that the settlement was complete.

Held that the effect of the whole course of legislation was that Civil Courts had jurisdiction in all matters exceeding Rs. 1,000 in value but that in matters pertaining to land though the value exceeded Rs. 1000, where the District was in course of settlement, the settlement officers had exclusive jurisdiction.

Held in consequence that the Bhagalpore Court had no jurisdiction to try the suit and the stipulation in the bond permitting the suit to be brought in that Court was of no avail as parties could not by consent give jurisdiction to a Court which did not possess it.

Held also: that in whichever Court the suit was laid, in matters pertaining to Sonthal Parganas, the rules relating to usury enacted by S. 6 of the Regulation applied.

A *proviso* and an *exception* distinguished.

Sonthal Parganas—(*contd.*) PAGE

Their Lordships felt bound to entertain a point of jurisdiction which had been raised in the Court of the First Instance and which did not depend upon any disputed facts though the point had not been pressed before the High Court.

Maha Prasad Singh v. *Ramani Mohan Singh* [*Lord Moulton* (*P.C.*).] 159

Specific Relief Act, S. 42.—*Declaration that decree in favour of defendant against third party was not binding—Brutum fulmen—No ground for refusing.*

A suit for a declaration by a person that as he is the owner of the property, the decree obtained by the defendant against a third party on the footing that he is the owner would not bind him is not liable to be dismissed on the ground that on his own allegations, the decree in favour of the defendant was but a *brutum fulmen* and did not need to be set aside.

Rajah Nilmoney Singh v. *Kally Churn Battacharya* (2) distinguished.

Pedda Nayanna v. *Sivanappa* (*Oldfield and Seshaghiri Aiyar JJ.*) 520

——— **S. 42**—*Right to property or legal character—Right to continue payment of subscription to Kuri—Not within.*

A suit for declaration that the plaintiff (a subscriber) is entitled to continue payment of subscription to the Kuri conducted by the defendant as he is not a defaulter does not lie under S. 42 of the Specific Relief Act. It is not a suit relating to a right to property or legal character as is contemplated by that section.

Ramakrishna Patter v. *Narayana* (*Patter Sadasiva Aiyar and Ayling JJ.*) 634

Stare decisis,—English and American law of fishery—Applicability to India. *See* Jalkar 419

Statute—Amending Act—Enlarging defences open—Applicability to suits instituted before coming into force of that Act—General Clauses Act, S. 6. *See* Invention Designs Act 573

———Interpretation. *See* Transfer of Property Act 494

Stay of suit—Grounds of—Abuse of process of court—Test—Civil Procedure Code, Ss. 22, 23,151 645

Stridhan—Degraded woman—Succession to—Legitimate son and not illegitimate daughter. *See* Hindu law, Stridhanam... ... 353

Sudras—Right of entry of—Hindu temple—Right of worship. *See* Religious Endowments, Hindu Temple 253

Suit—Maintainability of—Sanction to 2 persons under—Religious Endowments Act, S. 18—Suit by one. *See* Religious Endowments Act XX of 1863 24

Surety for restitution.—Execution against the property of a Hindu son after partition C. P. C. (O C) S. 253—(N. C.) S. 53. *See* C. P. C. S. 253 (O. C.) 112

Temple—Service Inam—Resumption. *See* Inam 57

Tender—Postal offer of expenses of sale deed—Whether a valid tender of the same. *See* Vendor and Purchaser 482

Takbust proceedings—Value, of as evidence when acquiesced in by parties—Whether estoppel. *See* Bengal Revenue Sales Act .. 365

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Tidal and Navigable rivers right to fishery in. *See* Jalkar ... 416

Title Deeds—Possession—Description of lands in registered deeds—Sufficiency of. *See* Possession 20

Time whether—Of the essence of contract—Sale of immoveable property —A finding of fact. *See* Vendor and Purchaser 482

Transfer of occupancy right—Liability for rent after notice to landlord —Tenancy by contract. *See* Landlord and Tenant 397

Transfer of Suits—From District Court to High Court Powers of High Court *See* Hindu Law 30

——— **of Property Act Ss. 4,54**—*Immoveable property of the value of less than Rs.* 100—*Oral sale—Vendee in possession—Effect of—Unregistered sale deed—No prior oral sale pleaded—Ineffectual to pass title—Evidence of adverse possession—Admissibility as—Registration Act, S.* 49.

An oral sale of immoveable property of the value of less than Rs. 100 already in the possession of the vendee will be upheld if it is shown that the vendor has by appropriate acts or declarations converted the possession of the mortgagee into one as a purchaser.

But where a sale was set up as having been effected by an unregistered sale deed accompanied by delivery of possession and no prior oral sale was pleaded.

Held having regard to S. 54 of the Transfer of Property Act, the unregistered deed could convey no title.

Held also : that the combined effect of Ss. 4 and 54 of the Transfer of Property Act read with S. 49 of the Registration Act was to prevent the deed from being given as evidence of adverse possession as purchaser.

Muthukaruppan Samban v. *Muthu Samban*. (*Seshaghiri Aiyar and Kumarasami Sastri, JJ.*) 497

——— **Act, S 68 (b)**—*Applicability to charge—S. 100—Statute—Interpretation—Application of S. 68 (b) to mortgagor's heir.*

Having regard to S. 100 of the Transfer of Property Act, the provisions of S. 68 of the Act as to the liability of a mortgagor who commits waste equally apply to persons creating a charge.

A provision in a statute which gives a right or imposes a liability on a person must be deemed to confer that right and impose that liability on that person's legal representative and if it confers that right or impose the liability on that person as the owner of a certain property, such right or liability is conferred or imposed on the assignee of the property unless the reason of the rule of law cannot clearly apply to anybody but the original owner of the property or the original obligor.

Held, accordingly that the heir also is liable to pay the mortgage money under S. 68 (b) of the Transfer of Property Act when he commits waste to the prejudice of the security.

Ramakrishnama Chetty v. *Vuvvali Chengu Aiyar*. (*Sadasiva Aiyar and Napier JJ.*) 494

Treasure Trove Act (Act VI, of 1878) Ss. 4, 20—*Finder—Cooly acting under the eye of the employed—No control over treasure—Effect of.*

The accused, two coolies working for hire under the eye of their employers turned up a box containing hidden treasure. The treasure was

Treasurer Trove Act—(*Contd*). PAGE.

removed by the employers and the accused had no control over it at any time. Nevertheless, they were prosecuted under S. 20 of the Treasure Trove Act and convicted.

Held that they were finders within the meaning of the Act and though they would not be liable for not depositing the treasure if they had no control over it, they were liable for non-compliance with the other conditions imposed on them by S. 4 and were properly convicted.

Mala Naicker In re (*Sadasiva Aiyar*) 477

Trusts Act, S. 90—*Mortgage—Mortgagee suing upon only one mortgage —Sale subject to earlier mortgages—Purchase by mortgagee—Transfer of Property Act, Ss. 67, 99—Not contravened—Ex parte decree against minors—No defence—Sale need not be set aside—Legal action of the mortgagee—Inadequate price as a result of—No remedy to judgment-debtors.*

Where a person holding two mortgages sued upon only one of them the later but the sale proclamation mentioned his earlier mortgage as well as another mortgage of which he had taken an assignment after suit and stated that the sale was to be subject to those mortgages and he himself purchased the property.

Held, that these facts were not sufficient to bring the case within S. 90 of the Trusts Act.

Held further that the procedure adopted did not contravene the provisions of either S. 67 or 99 of the Transfer of Property Act.

Per Miller J. An *ex parte* decree against minor defendants is binding against them unless negligence is brought home to the guardian. A sale held in execution of such a decree need not be set aside when it is not shown that the minors had any defence to put forward.

Where a decree was in the first instance made against the father and the minor sons but so far as the minor sons were concerned that decree was set aside and after the appointment of a fresh guardian, a decree in the same terms was again passed.

Held, that a sale on proceedings in execution commenced before the passing of the second decree (the sale proclamation and the sale taking place later) is not liable to be set aside on that ground when the guardian was aware of the proceedings and his objections were overruled.

Per Tyabji, J. Where the action of the mortgagee is perfectly legal, the mere fact that by reason of the action of the mortgagee the price fetched at the sale is inadequate is not a ground on which the sale could be set aside.

Ganapathi Mudaliar v. *Krishnamachariar*. (*Miller and Tyabji JJ*)... 218

Trustee—Power of dismissal—Vritikar. *See* Religious Endowments ... 179

Unchastity—Whether severs ties of blood. *See* Hindu Law—Stridranam. 353

Unregistered sale deed—No finds oral sale pleaded—Ineffectual to pass title. *See* Transfer of Property Act 494

Vendor and Purchaser—*Contract of sale of immoveable property—Time of the essence of contract—Finding of fact—Postal offer of expenses of sale deed—Not valid—Earnest money—Right of vendee to retain on default*,

Vendor and Purchaser—(*Contd*). PAGE.

Where after considering all the circumstances, the Lower Courts have come to the conclusion that time is of the essence of a contract for the sale of immoveable property, the High Court cannot in second appeal, interfere with that finding.

An offer by post to pay the expenses of executing the sale deed is not a legal tender of those expenses.

Where a contract of sale falls off by reason of the default of the vendor, the vendee is entitled to retain the earnest money. *Natesa Aiyar* v. *Appavu Padayachi* 24 M.L.J. 488 followed.

Veerayya v. Sivayya. (*Sadasiva Aiyar* and *Napier J.*) ... 482

————*Ejectment—Pleas open to defendant—Party in possession without title—Conveyance in favour of plaintiff—Sham or nullity.*

It is open to a party in possession to resist a suit in ejectment by showing that the sale in favour of the plaintiff was a mere sham and conveyed no title. *Trimbak Bhikaji* v. *Shankar Sham Rav*, (I.L.R. 36 B. 37) *distinguished Mulji*) *Govindaji* v. *Nathu Bhai* (I.L.R. 15 B. 1, followed.)

Rajammal v. *Madhava Yogi.* (*Ayling* and *Hannay, JJ.*) ... 445

Village Magistrate, if Magistrate under the Code. *See* Criminal Procedure Code, S. 250 37

Vizagapatam Agency Rules, R, 17, 20—*Order declining to entertain special appeal—Not decree—Not revisable by High Court.*

Under Rule 20 of the Vizagapatam Agency rules, the High Court has no power to direct the Agent to revise his order declining to entertain a special appeal under rule 17 as such an order is not a decree within the meaning of Rule 20. *Lakshminarayana Panigrahi* v. *Pasupureddi Gopi.* (*Benson and Sundara Aiyar JJ.*) 177

Waters, English and Indian Law of. *See* Jalkar 419

Will—Construction—Bequest in favor of unborn persons—Validity of ... 681

————Construction—Annuity for life whether lapses for unchastity ... 305

Withdrawal of suit—Sufficient ground, *ejusdem generis* with those in C. P. C., O. 23, Rr. (1), (2). *See* C. P. C. O. 23 R 1 480

Workman's Breach of Contract Act (Act XIII of 1859)—*Agreement to payment of advances by deducting from wages*

A contract for work providing for a portion of the wages going periodically in reduction of the advance falls within the scope of the Workman's Breach of Contract Act.

Queen v. *Tulukanam.* (1). *Tangi Joghi* v. *Hall* (2), Referred to.

Subramania Naidu v. *Singara Mudali.* (*Miller J.*) 616

————**(Madras Act XIII of 1859)**—*Contract to convey clay personally and with the assistance of another—Personal labour.*

Conveying clay would be "work" within the meaning of Act XIII of 1859 provided personal labour of the person undertaking the conveyance is intended to be utilized. The mere fact that another man is also to work with him does not exclude his undertaking from the scope of the Act.

Held accordingly, where the accused agreed to convey clay for the complainant in boats to be provided by the latter by his own personal labour and that of another to be provided free of charge by him, that the agreement came within the Act.

Mamubeari in re.—(*Ayling, J.*) 392

Worship—Right of—Hindu temple—Right of entry of Sudras into. *See* Religious Endowments 253

NOTES OF RECENT CASES.

Oldfield, J.
1914 July 16.

C. R. P. 578 of 1913.

C. P. C. (Act V. of 1908), Ss. 105, 115, O. 9, R. 13.—Order setting aside an ex parte decree—Revision.

The High Court *can interfere* in revision against an order setting aside an *ex parte* decree, though the aggrieved party has a remedy by way of appeal against the decree, that may be finally passed in that suit. *Nanda Ram* v. *Bhopal Singh* [1] not followed.

Gopala Chetti v. *Subbier* [2] referred to.

B. Sitarama Rao for the Petitioner.

C. A. Seshagiri Sastri for *K. V. Krishnaswami Aiyar* for the Respondents.

Oldfield and Napier JJ.
1914, July 20.

C. M. S. A. 77 of 1913.

Limitation Act (IX of 1908), Art. 182—Step in aid of execution—Application to continue the sale.

An application to the executing court by the decree-holder to continue the sale with a view to securing a better attendance of bidders on the following days is a step in aid of execution within the meaning of Art. 182, so as to furnish a fresh starting point of limitation. *Troylokya Nath Bose* v. *Jyoti Prokash Nandi* [3] relied on.

P. M. Srinivasa Chari for the Appellant.

N. S. Narasimhachari for *V. Ramadoss* for the Respondent

Ayling and Napier, JJ.
1914 July 21.

S. A. 1874 of 1913.

Madras Estates Land Act (I of 1908), S. 63—Presumption of full payment—Suit for settlement of rent—Payment of higher rates by sub-tenants whether affects the question.

1. (1903) I. L. R. 30 C. 761.

2. (1912) I. L. R. 34 A. 592.

3. (1903) I. L. R. 26 M. 601.

In a suit for arrears of rent where the landholder had passed a receipt to the ryot in respect of the suit *fasli* and nothing had been mentioned therein that it was on account, *held* under S. 63 of the Estates Land Act, the receipt is in full acquittance of the rent. Such a suit is not a suit for the settlement of rent. The fact that in some years, the sub-tenants of the defendant paid at higher rates does not affect the question..

N. S. Narasimha Chari for *V. Ramadoss* for the Appellant.

B. Narasimha Rao for the Respondent.

Wallis Offg. C. J. &
Kumaraswami, Sastri J.
1914 July 21.

A. S. 177 of 1910.

Hindu Law-Alienation by a coparcener of his share of the joint family properties—Whether alienee entitled to mesne profits against the other members of the family.

An alienee of the share of a member of a joint Hindu family is not a tenant in common with the other members of the family and is not entitled to the mesne profits of such share against the other members.

P. Narayanamurti for the Appellants.

T. Rangachariar, T. V. Muthukrishna Aiyar, and *B. Somayya* for the Respondents.

Seshagiri Aiyar, J.
1914 July 22, 23.

C. R. Ps. 1015, 1016, 1017 of 14.

Prov. Small Cause Courts (Act IX of 1887), Ss. 23, 25—Order returning a plaint under S. 23, whether revision lies against,—" decide " in S. 25, meaning of.

An order returning a plaint presented to a Court of Small Causes under S. 23 of the Provincial Small Causes Courts Act is an order deciding a case and as such the Court has power to revise the same under S. 25. *Subai Ram Dutt* v. *Jagadanunda Mazumdar* [1] dissented from *Umesh Chandra* v. *Rakhal Chundra Chatterjee* [2] Referred to.

P. S. Narayanaswami Aiyar for *C. V. Anantakrishna Aiyar* for the Petitioner.

C. A. Seshagiri Sastri for *K. V. Krishnaswami Iyer* for the Respondents.

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1. (1909) 13 C. W. N. 403.

2. (1911) 15 C. W. N. 666.

Oldfield &
Napier, JJ.
1914 *July*, 24

C. R. P. 631 of 1912.

Fraud in execution proceedings—Remedy of aggrieved party.

Where an order has been obtained fraudulently in execution it is open to the party aggrieved to vacate it by an application.

A Sundram for Petitioner.

S. T. Srinivasagopalachari for Respondent.

Sadasiva Aiyar and
Tyabji, JJ.
1914 *July* 24.

S. A. 1700 of 1912.

Res judicata—Suit for mesne profits by execution purchaser—Alienation pending suit—Suit for possession by alienee—Bar.

Where an execution purchaser pending a suit by him for mesne profits against a trespasser alienates the property and the vendee from the execution purchaser brings a suit for possession of the immoveable property against the trespasser *Held* that the decision as to plaintiff's title to the land in the previous suit for mesne profits was *res judicata*.

Dr. S. Swaminadhan for Appellants.

S. Ranganadha Aiyar for Respondent.

Sadasiva Aiyar and
Napier, JJ.
1914 July 27.

S. A, 877 of 1912.

T. P. Act, S. 68 (b)—Purchaser of mortgagor's right—Liability for waste committed.

The purchaser of a mortgagor's right in a rent sale is liable in damages to the mortgagee for waste committed by him in the mortgaged property.

Obiter. The provisions of S. 68 (b) applies to the case of charges also.

T. Narasimha Iyengar for Appellant.

S. Srinivasa Iyengar for Respondents.

Sankaran Nair and Spencer JJ.
1914 *July* 27.

C. M. A. 129 of 1914.

Appeal—C. P. C. S. 2, order 41, r. 5—Order refusing to stay the execution pending appeal.

No appeal lies against an order by the appellate Court refusing to stay execution pending appeal under order 41, r. 5 C. P. C.

T. R. Ramachandra Aiyar for Appellant.

J. L. Rosario for Respondent.

Sadasiva Aiyar and Napier, JJ.
1914 *July* 27.

S. A. 1497 of 1912.

Resumption—Temple service inam—Trustee's right to resume.

A temple trustee as such is not entitled to recover possession of lands held by temple servants under inam patta from the Government on the ground that the service is not being properly rendered, the power of resumption in respect of such lands being vested in Government. S. A. 201 of 1909 and S. A. 2215 * of 1912 followed.

P. Nagabhushanam for Appellant.

P. Somasundaram for Respondent.

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* (1914) 27 M. L. J. 57.

NOTES OF RECENT CASES.

Sankaran Nair, J.
Spencer, J.
1914 *July*, 28.

A. S. 132 of 1910.

Religious Endowments Act, S. 18—Sanction given to 2 people—whether one can sue.

Where sanction is given under S. 18 of the Religious Endowments Act to two people, one of them alone cannot sue without getting the sanction amended.

K. Ramanatha Shenai for Appellant.

K. Naraina Rao, B. Sitarama Rao and K. Y. Adiga for Respondents.

Sadasiva Aiyar and
Napier, JJ.
1914 July 28.

S. A. 1476 of 1910.

Possession—Trust property—Right of worshippers.

Worshippers whether individually or collectively are not entitled to sue for possession of trust property (in this case mosque.)

M. Krishnamachari for Appellants.

T. Narasimha Iyengar and *C. Padmanabha Iyengar* for Respondents.

Oldfield, J.
1914 *July*, 30.

C. R. P. 1000 of 1912.

Minor—Gross negligence of next friend—setting aside dismissal for default.

Gross negligence of the next friend is a ground for setting aside a dismissal for default.

B. Sitarama Rao for Petitioner.

K. Y. Adiga for Respondent.

Oldfield, J.,
Napier, J.
1914 *July*, 30.

C. R. P. 599 of 1913.

Civil Procedure Code, O. 23, rr. 1, 2. Appeal, Liberty to institute a fresh suit.

Pending an appeal, the appellate Court gave leave to withdraw the suit with liberty to bring a fresh suit.

Held: the appellate Court had no jurisdiction to do so. Order 23, R. 2 is confined to pending suits and does not extend to appeals.

V. Ramadoss for Petitioner.

P. Nagabhushanam for Respondent.

Seshagiri Aiyar, J., Kumaraswamy Sastri, J. 1914 August, 3. — S. A. 2057 to 2066 of 1912.

Rent Recovery Act—Cesses—Kanganam etc.

Kanganam Kulavettu, Amanji Poraswathantram Vamadai Vaikkalkattu, Tirmutti and Pakkillai are not cesses properly leviable from the tenants.

T. Rangachari and *K. V. Krishnasamy Aiyar* for Appellant.

B. Sitarama Rao and *S. R. Muthusami Iyer* for Respondent.

Seshagiri Aiyar, J. and Kumaraswamy Sastri, J. 1914 August 3. — S. A. No. 1688 of 1913.

Mortgage suit—S. 31 Limitation Act of 1908—Period expiring on a holiday—Plaint presented on the next re-opening day —Whether out of time.

Where the plaint in a mortgage suit governed by S. 31 of the Limitation Act of 1908, was filed on Monday the 8th August 1910, the 2 years' period under the section, having expired on Sunday the 7th Instant.

Held:—following *Murugesa Mudali* v. *Ramasami Chettiar* [1] that the plaint was presented in time.

S. Vencatachari for Appellant.

K. S. Ganesa Aiyar for Respondent.

Wallis, Offg. C.J., Hannay, J. 1914, August 7. — A. No. 280 of 1912.

Evidence Act—S. 112—Presumption—Applicability—Question as to exact time of conception.

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1. (1913) 26 M. L. J. 23.

Hindu Law—Joint family—Mortgage by father 276 days before birth of son—Validity—Onus of Proof.

Where in a suit for sale on a mortgage bond executed by the 1st defendant the undivided father of the 2nd, 276 days before the birth of the latter, the Court below dismissed the suit as against the 2nd defendant on the ground that under S. 112 of the Evidence Act there was a presumption that the 2nd defendant was in the womb on the date of the execution of the bond and that it was therefore not binding on him.

Held, that the onus lay on the 2nd defendant to prove that he was conceived in the womb on the date of the suit bond, that S. 112 was inapplicable to a case in which the question was as to the exact time of conception and that there was no presumption that a person was conceived in the womb within 280 days of his birth as the period of gestation varied considerably.

P. Narayanamurti and *P. Somasundaram* for Appellant.

Respondent was not represented.

Sadasiva Aiyar & Napier, JJ.
1914, August 10 — S. A. 1512 & 2229 of 1912.

Hindu Law—Joint family—Release by a father in favour of son—Validity—Consideration—Necessity.

Held that a release by a Hindu father in favour of his undivided son was valid even though not supported by consideration.

Peddayya v. *Ramalingam* [1] followed.

Appa Pillai v. *Ranga Pillai* [2] distinguished.

A. S. Vengu Aiyar for Appellant.

R. Subramania Aiyar for Respondent.

Sankaran Nair, J., Spencer, J.
1914, August 10. — A. S. 319 of 1913.

Hindu Law—Maintenance—Calculation of amount—Basis—Whether according to the share and status of the husband at his death or status of family at the date of suit.

Where a Hindu widow brings a suit claiming maintenance against the members of her husband's family according to the

1 (1888) I. L. R. 11 M. 406. 2 (1882) I. L. R. 6 M. 71.

status of the family at the date of suit and it was found that the family had a family trade in which the husband of the plaintiff took part during his lifetime, and the family acquired considerable properties by the trade after his death.

Held, the basis of calculation for maintenance is the share of the husband at the date of suit if he had been alive and not the share of the property that he would be entitled to at the date of his death.

T. Rangachariar for Mr. K. Srinivasa Iyengar and C. Padmanabha Iyengar for the Appellants.

C. V. Ananthakrishna Aiyar for the Respondent.

Sadasiva Aiyar & Napier, JJ. August, 1914. — C. R. P. 1074 of 1912.

Suit for declaration—Reversioner—Valuation for purposes of jurisdiction—Whether market value of the property or five times the assessment under Court Fees Act, S. 7, Cl. 5—Madras Civil Courts Act, S. 14.

A suit by a reversioner for a mere declaration that an alienation by a widow of lands is invalid cannot be placed higher for the purpose of valuation for jurisdiction than a suit for possession of the land covered by the declaration. Valuation should therefore be under S. 14 of the Madras Civil Courts Act and Court Fees Act, S. 7, Cl. 5.

T. Narasimha Aiyangar for the Petitioner.

K. Raja Aiyar for S. Srinivasa Aiyangar for the Respondent.

NOTES OF RECENT CASES.

Seshagiri Iyer and Kumaraswami Sastri, JJ.
1914 August, 10. S. A. 2044 of 1913.

Guardian—Admission by—Previous statement of witness—To be used only to contradict—Statement of person not called and not shown to be dead—Inadmissible.

A guardian has no power to make admission on the minor's behalf. A previous statement by a person can only be used to contradict his present testimony as a witness under S. 155 of the Evidence Act and not as substantive evidence.

A previous statement of a person who is not called and not shown to be dead is inadmissible.

T. Rangachari and *S. Ramaswami Iyer* for Appellants.

C. V. Anantakrishnier for Respondent.

Ayling and Tyabji JJ.
1914 August, 11. S. A. No. 2183 of 1912

Specific performance—Discretion of court to refuse—Grossy inadequacy of consideration.

In a suit for specific performance of a contract to convey land where the consideration was the services rendered by the plaintiff for the defendant in some litigation and where such services were held to be quite disproportionate to the value of the land claimed, *Held*, that the courts were right in refusing specific performance under S. 28 (a) of the Specific Relief Act.

Ganti Venkataramayya for Appellant.

N. S. Narasimhachari for Respondent.

Sadasiva Aiyar and Napier, JJ.
1914 *August* 18. S. A. 632 of 1913.

Mortgagee—Right of to pay and claim credit for cesses on land.

A sale for arrears of land cess and village cess, whether levied under Act II of 1864 or Act VII of 1865 would have the effect of

extinguishing prior encumbrances and so a mortgagee was entitled to pay it under both S. 72 (b) and 76 (c) and take credit for the same.

B. Narasimha Rao for Appellant.

Patanjali Sastri for *P. Narayanamurthi* for Respondent,

Oldfield and Seshagiri Aiyar, JJ.
1914 August, 18. — C. M. A. 208 of 1913

Guardian—Not appointed under the Act—Step-mother in possession of family property—Whether can be asked to pay a specified sum as maintenance to his step-brother and stepmother.

The court cannot order the step-brother in possession of family property to pay a specified sum as maintenance to his minor step-brother and stepmother under the Guardian and Wards Act when he is not a guardian appointed by the Court under the Act.

L. S. Veeraraghava Iyer for Appellant.

S. Ranganatha Iyer. for Respondent.

Sadasiva Aiyar and Tyabji, JJ.
1914 *August*, 18. — S. A. 1554 of 1912.

Hindu Temple—Right of worship—Right to exclude castes—Burden of proof.

When in a Hindu temple a certain Hindu caste claimed the right of worship by going as far as a certain place within the temple.

Held that the burden of proving that they were not so entitled lay on the party who seeks to exclude them.

Messrs. *T. R. Ramachandra Iyer* and *T. R. Krishnaswami Iyer* for Appellant.

Messrs. *T. Rengachariar* and *E. S. Chidamberan Pillai* for Respondents.

Sadasiva Ayiar and Napier, JJ.
1914 August, 19. — C. M. A. 251 of 1912.

C. P. Code, S. 48—Limitation 'certain date' meaning of in S. 48 (b).

Under S. 48 (a) C.P. Code the starting point of limitation is the date of the decree and not the date of the decree when it becomes executable.

Sadasiva Aiyar, J.—While expressing no opinion as to the correctness of the decision in *Narhar Regunath* v. *Krishnaji Govind*[1] held that equity favours such a construction though forced.

An application praying for the execution of a transfer deed which prayer had been granted on a prior application put in by the decree-holder but which had not been completed is not a fresh application within the meaning of S. 48 C. P. Code. The meaning of 'certain date' in S. 48 (b) considered.

N. S. Rangasami Iyengar for *T. Narasimha Iyengar* for Appellant.

S. Srinivasa Iyengar and *N. S. Narasimhachari* for Respondent.

Oldfield and Seshagiri Aiyar, JJ.
1914 *August*, 19. — L. P. A. 7 of 1913.

C. P. Code, O. 23, R. 1—Other sufficient cause.

Other sufficient cause in O. 23, R. 1 is a cause *ejusdem generis* with the earlier mentioned causes.

T. Ramachandra Rao for Appellant.

T. R. Venkatarama Sastri for Respondent.

Oldfield, and Seshagiri Aiyar, JJ.
1914 *August* 26. — S. A. 427of 1913.

Hindu Law—Stridhan Inheritance—Sudra prostitute—Whether son born during marriage or illegitimate daughter preferable heir.

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1. (1912) I. L.R. 36 B. 268 doubted.

Where a Sudra woman had a son by her marriage and after the death of her husband led the life of concubine and left an illegitimate daughter, in a suit by the illegitimate daughter claiming inheritance to the estate of her mother in preference to the legitimate son.

Held, (1) the property left by a prostitute is stridhan and is governed for the purpose of inheritance by the rules regarding stridhan.

(2) The rule in *Taramoni Dasis Case* [1] *Subraya Pillai* v *Ramaswami* [2] that the degraded heirs of a prostitute are to be preferred to the undegraded heirs not approved.

(3) The legitimate son is entitled to succeed in preference to the illegitimate daughter.

Per Oldfield, J. An illegitimate daughter is not an heir to the Stridhan of the mother.

P. S. Naraynaswami Iyer for the Appellant.

P. R. Ganapati Aiyar for *K. N. Aiyah* for the Respondent.

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1. 8 Ind. Dec. (O. S.) 247. 2. I. L. R. 28 Mad. p. 171.

NOTES OF RECENT CASES.

Before Bakewell J.
(Original Side)
1914 *September* 8.

C. S. 132 of 1913.

Taxation—Original Side rules Appx. rule 31 (a).

The taxing officer having taxed the Vakil's fees in the defendant's bill of costs at 2½% when at the settlement of issues, the suit had been dismissed as disclosing no cause of action, the defendants applied to the court for review of taxation, claiming 5% for Vakil's fees, and contended that the dismissal of the suit being after the filing of the written statement, should be deemed to be on the merits after contest and hence the vakil was entitled to the full fees of 5% under Appendix II, rule 31 (a) of the Appellate side rules.

Held, that as there was no trial of the suit itself on the merits by examining witnesses or filing documentary evidence, the dismissal of the suit before the settlement of issues cannot be deemed to be a decision on the merits after contest within the meaning of Appendix II, r. 31-(a) of the appellate side rules.

G. Annaji Rao in support of the bill for Defendants.

K. Ramachandran for Plaintiffs.

Officiating Chief Justice
Seshagiri Aiyar J.
September 8th, 1914.

A. No. 277 of 1911 and
S. A. No. 1508 to 1510 of 1912.

Dharmilla Inams—Holder of—Whether "land-holder" within the meaning of Estates Land Act —Civil Court—Jurisdiction.

The holder of a Dharmilla Inam that is the alienee of the lands situated in a permanently settled village long before the date of the Estates Land Act and after the date of the permanent settlement is a *landholder* within the meaning of the Act. Although the lands do not form an estate by themselves they are a part of an estate and a suit by the alienee to eject a ryot let in by him into the land is not maintainable in a civil court as S. 189 of the Estates Land Act bars the jurisdiction of civil courts.

V. Ramdoss for Appellant.

B. N. Sarma, V. Ramesam and *G. Venkatramiah* for Respondents.

Ayling, J.
Hannay, J.
1914, September 9.

S. A. No. 467 of 1913.

Hindu Law—Alienation by widow—Who can question—Ejectment suit—Whether a trespasser defendant can plead that the sale to plaintiff was a sham transaction.

A sale by a Hindu widow cannot be questioned by anybody who is not a reversioner, though the sale-deed is not supported by consideration.

Where a person claiming under a sale-deed from the owner thereof sues a trespasser in ejectment, it is open to the defendant to plead that the sale to plaintiff was a sham transaction and did not confer title. *Trimbak Bhikaji* v. *Mahadeo Balwant* [1] not followed; *Mulji Govindji* v. *Nathubhai Hirachand*[2] followed.

T. V. Muthukrishna Aiyar for the Appellant.

C. V. Anantakrishna Aiyar and *P. S. Vaithyanatha Aiyar* for the Respondents.

Sadasiva Aiyar J.
Napier J.
1914, September 9.

S. A. 636 of 1913.

Limitation Act IX of 1908, Art. 116—Vendor and purchaser—Breach of covenant for title—Vendee aware of defect of title—Transfer of Property Act, s. 55 (2).

A suit to recover compensation for breach of covenant for title under a sale-deed is governed by Art. 116 of the Limitation Act. *Krishnan Nambiar* v. *Kannan* [3] followed.

A vendee is entitled to recover compensation for breach of covenant for title, though he knew the defect of title of the vendor, unless the sale-deed expressly excludes the operation of S. 55 (2) of the Transfer of Property Act.

C. V. Anantakrishna Aiyar for Appellant.

G. S. Ramachandra Aiyar for Respondent.

1. (1911) I.L.R. 36 B. 37.
2. (1890) I.L.R. 15 B. 1.
3. (1897) I. L. R. 21 M. 8.

Sankaran Nair J.
Spencer J.
1914, September 10.

A. S. 164 of 1911.

Contract Act, S. 23—Agreement opposed to public policy—Promissory note by adopted son to the father of the adoptive mother to induce her to take him in adoption.

A promissory note executed by the adopted son to the father of his adoptive mother to induce her to take him in adoption is opposed to public policy and cannot be enforced.

T. R. Ramachandra Aiyar, T. Narasimha Aiyangar, T. R. Krishnaswami Aiyar, and *N. Viswanatha Aiyar,* for the Appellant.

R. Shadagopachariar and *A. Krishnaswami Aiyar* for the Respondent.

Seshagiri Aiyar J.
Kumarasami Sastri J.
1914, August 11.

S. A. 529 of 1913.

Madras Estates Land Act I of 1908, Sched. A, Art. 8, Suit for the purpose of ascertaining rent—Interpleader between landlord and Government as to water-cess—Limitation Act IX of 1908 S. 15—Injunction refused by lower appellate Court—Case remanded by the High Court—Whether section applies.

An interpleader suit by a tenant against the landlord and the Government to determine as to whom between the two water-cess is payable, is not a suit for the purpose of ascertaining the rent within the meaning of Art. 8, Sch. A of the Estates Land Act.

Where in a suit a perpetual injunction was granted by the Munsif's Court but on appeal the District Judge dismissed the suit altogether and the High Court in second appeal set aside the order of the lower appellate Court and remanded the appeal for disposal according to law, the period between the decision of the lower appellate Court and that of the High Court cannot be

availed of under section 15 of the Limitation Act as a period during which injunction continued to subsist.

C. Padmanabha Aiyangar for Appellants.

L. A. Govindaraghava Aiyar and A. Ramachandra Aiyar, for the Respondents.

Ayling J.
Tyabji J.
1914, September 16. } S. A. 1045 of 1912.

Muhammadan Law—Gift—Delivery—Necessity of—Gift by grandfather to his minor grandson during his son's life-time—Transfer of Property Act, S. 43—Applicability of—Estoppel.

Under the Muhammadan Law, a gift of immoveable property by a grandfather to his minor grandson during the life-time of the latter's father is not valid unless accompanied by delivery—Such delivery as the property is capable of. The mere declaration of the grandfather of his intention to divest himself of possession and vest it in the minor is not enough.

Where a Muhammadan executed a mortgage in respect of certain properties representing himself to be the owner thereof but in a suit on the bond his father raised the defence that the property belonged to himself and the mortgage was not binding on him and died pending the disposal of the suit, leaving his son, the mortgagor his heir, *Held* that the son was under S. 43 of the Transfer of Property Act estopped from setting up the invalidity of the mortgage and that plaintiff was therefore entitled to redeem.

K. V. Krishnaswami Aiyar for *S. Gopalaswami Aiyangar* for Appellants.

A. Visvanatha Aiyar for *Hon. Mr. B. N. Sarma* for Respondents.

Sadasiva Aiyar J.
Napier J.
1914, September 16. } S. A. 1264 of 1913.

Tender through postal letter—Validity of.

A tender of money through a postal letter is not a good tender.

N. S. Narasimhachari for Appellants.

V. Ramesam for Respondents.

Ayling J.
Hannay J.
1914, September 17.

S. A. 70 of 1913.

Lease by person not in possession—Ejectment suit by lessee—Genuineness of lease if can be questioned by trespasser—Admission of genuineness by real owner—Effect.

A tenant from the real owner is entitled to recover possession of the property leased to him from a trespasser though the tenant was not put in possession under the lease. It is not open to the trespasser in possession to set up that the alleged lease was false and that plaintiffs did not obtain possession under it in face of an admission of the lease by the real owner.

T. R. Ramachandra Aiyar for Appellant.

A. S. Visvanatha Aiyar for *T. R. Venkatrama Sastri* for Respondents.

Ayling J.
Hannay J.
1914, September 17.

S. A. 435 of 1913.

C. P. Code—O. 64—Explanation.

Where an attachment of the properties of the judgment-debtor had been made by one decree-holder and the properties were transferred by the judgment-debtor after the attachment, another decree-holder who applies for rateable distribution after the transfer cannot avoid the transfer under S. 64, C. P. Code.

Mr. P.S. Narayanasami Aiyar for *Mr. C.V. Ananthakrishna Aiyar* for Appellants.

Mr. C. Madhava Nair for Respondents.

Ayling J.
Hannay J.
1914, September 19.

S. A. 1010 of 1913.

Partnership—Dissolution—Acknowledgment of debt by one partner —Effect on others.

After the dissolution of a partnership one of the expartners cannot without express authorisation from others acknowledge a partnership debt so as to bind others. A power to pay off claims includes a power to acknowledge.

Mr. B. Sitarama Rao for Appellants.

Mr. C. V. Ananthakrishna Aiyar for Respondents.

NOTES OF RECENT CASES.

Wallis Offg. C. J.
Seshagiri Aiyar, J.
1914, September 22.

A. S. 129 of 1913.

Limitation Act, S. 28, Art. 144—Suit by adopted son—Inam grant—Trespasser from widow—Possession for over 12 years—Accrual of cause of action—Interest of trespasser in the land.

In a suit for the recovery of Inam property by a person adopted by a Hindu widow from a trespasser who had been in possession of the properties for over 12 years *Held* that the cause of action accrued to the adopted son on his adoption, (2) that even if the defendant was in possession for over 12 years, the suit was not barred as against the adopted son though it would be barred against the widow (3) that what the trespasser acquired was only the widow's interest under S. 28 Limitation Act and that art. 144 applied.

P. Nagabushanam and *T. R. Venkatarama Sastri* for Appellants.

V. Ramadoss for Respondents.

Wallis, C. J.,
Seshagiri Iyer J.
1914, September 23.

A. S. 188 of 1911.

Madras Irrigation Cess Act (VII of 1865)—Inam lands irrigated with Government water—Exemption from water cess—Engagement need not be express—Inam title deed whether conclusive as to extent of cess free lands.

To exempt inam lands watered by Government water from liability to imposition of water cess under Act VII of 1865, the engagement with the Government need not be express. The extent classed as such in the inam title-deed is not conclusive as to the extent entitled to irrigation free of charge. Such an engagement in respect of lands stated as dry in the inam title-deed may be inferred from the conduct of the parties and the circumstances of the case.

Per Wallis, C. J. Where a state of things has prevailed for 60 years it must be referred to a legal origin if possible.

P. R. Ganapathi Aiyar and *R. Rangaswami Aiyangar* for Appellants.

The Government Pleader for Respondents.

Sadasiva Ayar J.,
Napier J.
1914, September 23.

S. A. 542 of 1913.

Writer of document—Signing as writer not as witness—Signature after execution—Effect of.

A person who signs a document describing himself as the writer thereof but not as an attesting witness is deemed to be an attesting witness if as a fact he witnessed the execution of the document and signed it subsequently.

V. S. Govindachari for Appellants.

Patanjali Sastri for Respondents.

Wallis Offg. C. J.
Ayling and
Seshagiri Aiyar JJ.
1914, September 24.

S. A. 1804 of 1911.

C. P. Code, O. 2, r. 2.—Suit for recovery of lands—Subsequent suit for mesne profits accrued due prior to suit for recovery of the land—Maintainability of—Causes of action different.

A suit for the recovery of lands from a trespasser is no bar to a subsequent suit for mesne profits accrued due prior to the suit for possession. The claim for possession and the claim for mesne profits are based on different causes of action: 9 C. 283, 19 C. 615, 31 M. 405 followed.

L. A. Govindaraghava Aiyar for Appellants.

Mr. T. R. Krishnaswami Aiyar for Respondents.

Wallis O. C. J.
Ayling J.
Seshagiri Aiyar J.
1914, September 24.

L. P. A. 37 of 1914.

Vendor and purchaser—Contract to sell—Deposit of earnest money with vendor—Provision for forfeiture of deposit and damages in case of vendee's failure to purchase—Damages, measure of—Vendee if entitled to credit for deposit in calculating damages.

In a suit by a vendor against the vendee for damages for breach of a contract to purchase property the vendee is entitled to a credit for the amount of earnest money deposited by him with the vendor in pursuance of the contract notwithstanding an express provision in the contract for forfeiture of deposit and for the payment of damages by the vendee in case of a breach of the contract by him.

S. Varadachariar for *L. A. Govindaraghava Aiyar* for Appellants.

C. R. Subramaniya Aiyar for Respondents.

Oldfield J.,
Tyabji J. } S. A. 2112, 2113 to 2139 of 1913.
1914, September, 30.

Madras Local Boards Act, S.73 prov. 1—Usufructuary mortgagee—Whether a holder of an under-tenure—Collection of cesses from tenants.

A usufructuary mortgagee, who has got an assignment of all the rights of the mortgagor for a term of 25 years, the term of the usufructuary mortgage, is an intermediate landholder holding an under-tenure within the meaning of S. 73 proviso 1 of the Local Boards Act; and he is entitled to pay local cesses and collect the same from the tenants.

K. Srinivasa Aiyangar and *M. Purushotham Naidu* for Appellants.

Dr. S. Swaminathan and *B. Narasimha Rao* for Respondents.

The Offg. Chief Justice
Seshagiri Aiyar J. } A. S. 124 of 1911.
1914, September 30.

Limitation Act IX of 1908, S. 19—Acknowledgment of liability—Statement in Irusalnama.

Where the plaintiff brings a suit on the 20th April 1911 for rent which fell due on the 15th February 1902, on a registered contract of lease, and he relied on a statement in an *irusalnama* *i.e.*, a remittance challan by the defendant advising the sending of Rs. 20, "*towards the lease amount of Kodala village for fasli* 1311" as an acknowledgment of liability under S. 19 of the Limitation Act.

Held following 33 Cal. p. 1047, it is a valid acknowledgment of the suit liability.

K. Patanjali Sastri for *P. Narayanamurti* for Appellant.

S. Swaminathan for Respondent.

Oldfield J.,
Tyabji J.
1914, September 30.

C. M. S. A. 80 of 1913.

C. P. C. S. 47—O. 21, Rr. 89, 90—Scope of—Execution sale—Setting aside—Application by judgment-debtor on the ground that the sale was in contravention of the decree—Limitation Act, Art. 166—Applicability of—C.P. Code, S. 151—Inherent powers of Court—Limits to exercise of.

Oldfield J.—O. 21, Rr. 89 and 90 do not exhaustively provide for all the cases in which a sale in execution of a decree may be set aside. Under S. 47 C. P. C., it is open to the judgment-debtor to apply to the Court to set aside the sale on the ground that the executing Court contravened the terms of the decree by ordering the sale of one property before another.

An application to set aside a sale whether under O. 21, rr. 89 & 90 or S. 47 of the Code, is governed by Art. 166 of the Limitation Act.

The inherent powers of a Court under S. 151, C. P. C. cannot be invoked when there is a provision in the Code applicable to the case.

Per. Tyabji: The Court has an inherent jurisdiction to recall an invalid order on the ground that it is in contravention of the terms of the decree. The inherent powers of a Court can be exercised only with special regard to the conduct of the party invoking such powers. Art. 166 of the Limitation Act does not in terms govern an application like the present but its principle may be applied to cases where the inherent powers of the Court are invoked.

C. V. Ananthakrishna Aiyar for Appellants.

A. Krishnaswami Aiyar for *T. Natesa Aiyar* for Respondents.

NOTES OF RECENT CASES.

Sadasiva Aiyar J. *and Napier J.* *1914, September 30.* } S. A. 1058 to 1066, 1068 to 1077 of 1913.

Contract—consideration—Payment of rent at higher rate for 60 years—Presumption—Madras Estates Land Act, S. 13 cl. (3)—Scope of contract for payment of rent at higher rate for crops raised with improvements made at tenants' sole expense—Contract before the Act—Improvements effected before the Act—Effect.

From the fact that rent was paid at a higher rate for 60 years, a contract to pay at that rate and the consideration therefor may be presumed.

Per Sadasiva Aiyar J. (*Napier J. Diss.*) S. 13 cl. (3) of the Estates Land Act has not the effect of taking away rights vested in the tenant before the Act, its object being to enlarge such rights. After the passing of the Estates Land Act the landlord is not entitled to claim enhanced rent where the increase in the yield is due to improvements effected by the tenant. It is immaterial whether such improvements were effected before or after the Act and whether or not there was a contract to the contrary either before or after the Act.

Napier J. S. 13. cl. (3) has no application where the contract was entered into long before the Act and rights have grown up thereunder.

L. A. Govindaraghava Aiyar and *L. S. Veeraraghava Aiyar* for Appellants.

S. T. Srinivasagopalachari for Respondents.

Hannay J. *1914, September 30.* } C. R. P. 1039 of 1912.

C. P. Code, S. 115—Revision—Remedy by suit available—Revision if lies—Execution proceedings—Res judicata.

The High Court will not interfere in revision when the aggrieved party has a remedy by way of suit. An application for possession in execution of a decree is not barred by reason of the dismissal of a prior application for possession on the ground of obstruction by a stranger.

K. S. Ganapathi Aiyar for Petitioners.

C. V. Ananthakrishna Aiyar and *A. Swaminatha Aiyar* for Respondents.

Ayling J.
Sadasiva Aiyar J.
1914, October 1.

S. A. 662 of 1913.

Inam—Service Inam—"Past and future Services"—'Nakkash' or painting service—Grant to Defendants ancestor to be enjoyed from generaation to generation—Defendants willing to render service—Grantor, whether can resume Inam.

Where the predecessor in title of the plaintiff granted the suit lands to the ancestor of the Defendants in consideration of "past and future services", to be enjoyed from generation to generation for performing Nakkash (painting) service to the satisfaction of the Zemindar.

Held Per Sadasiva Aiyar J. that the grant was one in lieu of wages for the performance of service and as such was resumable by plaintiff on giving notice of the termination of the services.

Per Ayling J. That the grant was one burdened with a service and for an hereditary office and it could not be revoked so long as the office was subsisting and so long as the grantee's successors are willing to perform the services.

P. Somasundaram for the Appellant.

S. Srinivasa Aiyangar for the Respondent.

Ayling J.
Hannay J.
1914, October 2.

S. A. 1659 of 1913.

Specific Relief Act, S. 27, cl. (b)—Vendor and purchaser—Agreement to sell to A—Subsequent conveyance to B—Mere recital in sale-deed of receipt of consideration—Notice of prior agreement after execution of sale-deed but before registration—Effect—Specific performance of prior agreement, whether can be enforced.

Where in a suit for specific performance of a contract to sell against the vendor and a purchaser from him of the suit property under a sale-deed executed subsequent to the agreement in favour of the plaintiff it appeared (1) that the sale-deed was executed in consideration of the amount due to the purchaser from the vendor under a prior deed of mortgage but there was no actual passing of consideration (2) that the subsequent purchaser had notice of the prior agreement in favour of the plaintiff after the execution of the sale-deed to him but before its registration.

Held that the subsequent purchaser was not a purchaser for value without notice so as to entitle him to resist a suit for specific performance of the prior contract of sale.

K. Srinivasa Iyengar and *A. Krishnaswami Aiyar* for Appellants.

T. V. Muthukrishna Aiyar for Respondents.

Wallis, Offg. C. J.,
Seshagiri Aiyar J.,
Kumarasami Sastri J.
1914, October 5.

L. P. A. 43 of 1913.

Landlord and tenant—Agricultural lease—Notice to quit during cultivation—Invalidity of—Notice whether operates to determine tenancy at the end of the year—Holding over after notice to quit—Provisions in the old lease whether govern the new tenancy.

In the case of an agricultural lease notice to quit during the cultivation season is valid and does not operate to determine the tenancy even at the end of the season. If a tenant to whom property had been leased for some years, holds over after a valid notice to quit, he is to be deemed a tenant from year to year and he is entitled to claim the benefit of a provision in the old lease allowing him a remission for bad seasons.

R. Sadagopachariar and *V. Venkatachariar* for Appellants.

V. Purushotham Aiyar for *T. R. Venkatarama Sastri* for Respondents.

Wallis, Offg. C. J.
Ayling J.
Seshagiri Aiyar J.
1914, October 6.

L. P. A. 71 of 1913.

C. P. Code, Ss. 44, 13, 2 cl. (5) and (6)—Judgment of Cochin Court, whether a "foreign judgment"—Execution of decree of Cochin Court in British Indian Courts—Power of British Courts to question jurisdiction of Cochin Court to pass the decree—S. 44, and notification thereunder—Effect of—"May be executed......as if they had been passed......" meaning of—Appearing to save property seized by Cochin Court—Objecting to jurisdiction and pleading to merits whether amounts to submission to jurisdiction.

The Cochin Court is a "foreign court" and its judgment a "foreign judgment" within S. 2. cl. (5) and (6) of the Code. The effect of a notification by the Government of India under S. 44 C. P. C. is not to abolish the distinction between the decrees of

the courts of favoured Native States and those of British Indian Courts. The provisions of S. 44 must be read subject to S. 13 of the C. P. Code and all objections to a foreign decree under S. 13 are available to a defendant against a decree of the Courts of favoured Native States. The effect of the words "executed as if they had been passed" in S. 44 C. P. Code, is merely to extend to a decree of a Court of a favoured Native State the manner and machinery of execution applicable to decrees of British Indian Courts. The jurisdiction of a British Indian Court to entertain an objection as to the jurisdiction of the Cochin Court to pass the decree sought to be executed, is not taken away by S. 44.

Per Seshagiri Aiyar J.—Appearance to protect property seized by a foreign Court and protesting to its jurisdiction, though pleading to the merits, is not voluntary submission to the jurisdiction of the foreign Court.

Semble.—A suit may be filed on a judgment of a Court of a Native State.

Quaere.—Whether a Court executing a decree of a British Indian Court has no jurisdiction to question the jurisdiction of the latter to pass the decree sought to be executed.

K. S. Pandalay for *S. Swaminadhan* for Appellants.

C. V. Ananthakrishna Aiyar for Respondent.

Sankaran Nair J.
Spencer J.
1914, October 6.

A. S. 216 of 1911.

Impartible Estate—Maintenance of junior members—Rate once fixed if can be varied—Power of Zemindar to bind his successor by agreement to pay maintenance at a fixed rate.

In a suit by a junior member of an impartible estate claiming maintenance at a rate agreed upon by a registered contract between him and a predecessor of the defendant (the Zemindar.)

Held that it was open to the defendant, the present Zemindar, to plead that the rate agreed upon was excessive having regard to the condition of the estate at the time, and that it was not open to a Zemindar to impose on his successors to the estate an obligation to pay maintenance for ever to a junior branch at an unalterable rate.

S. Srinivasa Iyengar for Appellants.

L. A. Govindaragava Aiyar and *S. Varadachariar* for Respondents.

NOTES OF RECENT CASES.

Wallis Offg. C. J.,
Seshagiri Aiyar, J.
1914, October 8.

A. S. 143 of 1911.

Natural stream—Spreading course at intervals,—Effect of—Riparian owners, rights of—Right of upper land owner to discharge water thereon to adjacent land—Easements Act, S. 7 ill. (i).

A natural stream does not cease to be such because after a certain point it flows in a spreading course without a well-defined channel and a lower riparian owner is not entitled to obstruct the flow of such water so as to cause a submergence of the lands of the upper owner. The right of an owner of upper land to discharge the water thereon to a neighbouring land of a lower level is a natural right within the meaning of S. 7 ill (i) of the Easements Act, and the owner of a lower land cannot obstruct the natural flow of water to his land. 25 M. L. J. 276 followed.

T. R. Ramachandra Aiyer and *S. Subramania Aiyar* for Appellant.

The Government Pleader for Respondent.

Oldfield J.,
Tyabji J.
1914, October 8,

S. A. 735 of 1913.

C. P. Code, O. 21, Rr. 101, 103—Order directing delivery of possession under r. 101—Actual possession not given to applicant—Effect of order on auction purchaser—Limitation Act art. 11. A.

The possession directed to be given to an applicant under O. 21, R. 101 is either actual or symbolical possession. Where an order was made under O. 21, R. 101 directing the applicants to be put in joint possession with the auction purchaser but the applicants did not obtain actual possession. ***Held,*** that the order was conclusive against the auction purchaser unless set aside within the period prescribed by Art. 11. A of the Limitation Act and that it did not make any difference that only symbolical possession was given to the applicants, the actual possession remaining with the auction purchaser himself.

K. Jagannatha Aiyar for Appellants.

G. S. Ramachandra Aiyar for Respondents.

Sadasiva Aiyar J.
Napier J.
1914, October 13.

S. A. 158 of 1913.

Mortgage—Construction—Instalment Bond—Provision for payment on demand in default—Provision for possession to be retained by mortgagor with consent of mortgagee—Adverse possession against mortgagor—Effect against mortgagee.

Where in an instalment mortgage bond provision was made for payment on demand of principal and increased rate of interest on default, and for possession of the mortgaged properties to be retained by the mortgagor with the consent of the mortgagee and also for the payment by the mortgagor of the produce towards interest *held* whether the original mortgage was simple or usufructuary, it became simple after default and that any possession which was adverse to the mortgagor was not adverse to the mortgagee.

K. Bhashyam for Appellants.

S. Satyamurti for *K. Rajah* for Respondents.

Ayling J.,
Hannay J.
1914, October 14.

S. A. 1128 of 1913.

C. P. Code, S. 11. Expln. (V)—Res-judicata—Suit for possession and mesne profits from date of suit till delivery—Decree for possession—Decree under new Code—Fresh suit for recovery of mesne profits between the date of the plaint suit and the date of the decree—Maintainability of—C. P. C. S. 47 and O. 20, R. 12, Effect of.

Where in a suit for possession of immovable property and for mesne profits from date of suit up to date of delivery of possession, the decree was silent as regards the mesne profits claimed *held* that a subsequent suit for recovery of mesne profits between the date of the prior suit and the date of decree was barred by the rule of *res judicata.*

Semble :—The ratio decidendi of 15 M. L. J. 462 does not hold good after the enactment of O. 20, R. 12 and S. 47 of the new C. P. Code.

K. R. Rangaswami Iyengar for *C. V. Ananthakrishna Aiyar* for Appellants.

S. Varadachariar for *K. V. Krishnaswami Aiyar* for Respondents.

Ayling J.,
Hannay J.
1914, October 15.

S. A. 2304 of 1913.

Mortgage—Suit for redemption—Tender of mortgage amount before suit—Improper rejection by mortgagee—Costs.

Where in a suit for redemption it appeared that the amount of the mortgage money was tendered prior to the suit by the mortgagor to the mortgagee and was improperly rejected by the latter *held* that the mortgagee was liable for the costs of the mortgagor in the redemption suit. 5 M. 284 followed.

C. Madhavan Nair for *Government Pleader* for Appellants.

S. Soundararaja Aiyangar for *B. Sitarama Rao* for Respondents.

Wallis, O. C. J.,
Seshagiri Aiyar, J.,
Kumarasawmi Sastri J,

S. A. 696 of 1913.

Court Fees Act, s. 7. cl. (4) (c), sch. 2 art. 17 cl. (3)—Suit for declaration that decree is not binding for injunction—Valuation—advalorem Court fee if leviable.

Where a suit was brought for a declaration that a decree passed against the plaintiff was not binding on him and for an injunction to restrain the defendant from executing the decree.

Held, that it was a suit for declaration with consequential relief under S. 7. cl (4) (c) of the Court Fees Act and that the Court was bound to accept such valuation as might be fixed by the plaintiff.

V. Visvanatha Sastri for Appellants.

T. V. Muthukrishna Aiyar for Respondents.

Sadasiva Aiyer J.,
Napier J.
1914, October 15.

S. A. 1270 of 1912.
C. R. P. 899 of 1912.

Revenue Recovery Act, S. 59—Suit by mortgagee to set aside revenue sale of property—Fraudulent default of mortgagor—Suit whether within S. 59 of the Revenue Recovery Act -Bona fide *lessee from purchaser—liability of.*

S. 59 of the Revenue Recovery Act has no application to a suit by a mortgagee to set aside a revenue sale of the mortgaged properties brought about by the fraudulent default of the mortgagor when the purchase was benami for the mortgagor.

12 M. 638 F. B. Distinguished.

A lessee *bona fide* holding under a registered lease from the said purchaser will not be liable for the return of the produce from the said lands received by him during the term of the lease.

P. Nagabushanam for Appellants.

B. Somayya for Respondents.

Ayling J.,
Hannay J.,
1914, October 16. — S. A. 1411 of 1908.

Indian Succession Act—Conversion of a Hindu family to Christianity—Members living together—Effect—Joint tenancy whether subsists—Rule of succession.

Where a Hindu family has been converted to Christianity the devolution of property in the family is regulated by the Indian Succession Act and not by the law of survivorship though it is shown that the members of the Christian family lived after the manner of a joint Hindu family.

10 M. 69
1912 M.W.N. 386. } followed.

A. Sivarama Menon for Appellants.

C. V. Ananthakrishna Aiyar for Respondents.

Ayling J.,
Hannay J.,
1914 October 16. — S. A. 81 of 1913.

C. P. Code, S. 100—Second appeal, Grounds of—Refusal to receive additional evidence on appeal, no ground—C. P.C., O. 41, R. 27.

The refusal, by the lower appellate Court, in the exercise of its discretion, to receive additional evidence under O. 21 R. 27 is no ground for a second appeal to the High Court.

33 A. 379 followed.

C. V. Anantakrishna Aiyar for Appellant.

M. D. Devadoss for Respondents.

Oldfield J.
Tyabji J.
1914, October 20.

C. M. A. 55 of 1913.

Provincial Insolvency Act Ss. 12 (2), 46—Petition by creditor for an order of adjudication—Notice to other creditors essential—Right of other creditors to object to adjudication—creditor not served with notice and not made a party, taking a mortgage from debtor, whether an " aggrieved person "—Appeal.

Where a creditor applies to have a debtor adjudged an insolvent, the other creditors are entitled to notice under S. 12 (2) of the Provincial Insolvency Act and to be heard by the Court before passing the order of adjudication. An order of adjudication passed without notice to the other creditors and without hearing their objections, if any, is bad in law.

A creditor to whom no notice was given under S. 12 (2), whose petition to be made a party to the proceedings was rejected, and who took a mortgage security for his debts within 3 months of the petition of insolvency filed by another creditor, is an " aggrieved person " and can appeal against the order of adjudication under S. 46 of the Provincial Insolvency Act.

L. A. Govindaraghava Aiyar and *T. M. Krishnaswami Aiyar* for Appellants.

V. C. Seshachariar for Respondents.

Oldfield J.
Tyabji J.
1914, *October* 20.

C. R. P. 858 of 1913.

Res judicata—Suit for possession and mesne profits—Subsequent mesne profits expressly asked for—Decree silent—Suit for maintainability.

A suit for subsequent mesne profits will be barred by *res judicata* if in a prior suit for possession and for mesne profits subsequent mesne profits also were expressly asked for and the decree was silent about them. The ruling of the Full Bench in 15 M. L. J. 462, is not good law under the New C. P. C. of 1908.

K. S. Jayaram Aiyar for Petitioner.

S. T. Srinivasa Gopalachari for Respondent.

Ayling J.,
Hannay J.
1914, *October* 21.

Cr. Revn. case 326 of 1914

Cr. Pr. Code, Ss. 181, 179.—I. P. C. S. 405—Accused residing at Bombay—Receipt of Hundis, encashment, and criminal breach of trust by accused—Offence, when complete—Payees of Hundis, residence at Coimbatore—Jurisdiction of the Sub-Divl. Magistrate of Coimbatore to try.

Where the accused, residents of Bombay, received certain Hundis from the complainants (who were residents of Coimbatore), for encashment and converted to their own use the proceeds *held* that the offence of criminal breach of trust was completed at Bombay, that the offence came within S. 181 (2) of the Criminal Procedure Code and that the Sub-Divisional Magistrate of Coimbatore had no jurisdiction to try the accused under S. 179, Criminal Procedure Code.

Dr. S. Swaminathan for the Accused.

The Public Prosecutor for the Crown.

Ayling J.,
Hannay J.
1914, *October 21.*

S. A. 2026 of 1912.

Limitation Act—Art. 62, 120—Suit under S. 73 (2) C. P. C.—Limitation.

A suit by the plaintiff under S. 73 (2) of the Civil Procedure Code for a refund of the amount of assets liable to be rateably distributed, which was paid to the defendants who were not entitled to receive the same, is governed by Art. 62 and not by Art. 120 of the Limitation Act.

C. V. Anantakrishna Aiyar for Appellants.

L. A. Govindaraghava Aiyar for Respondents.

Sadasiva Aiyar J.
Napier J.
1914, October 21.

S. A. 1574 of 1912.

Hindu Law--Minor—Alienation by guardian—Partial necessity—Suit by minor to set aside alienation—Proper Decree, form of.

Where the guardian of a Hindu minor sold properties belonging to the minor for Rs. 1425 out of which only a sum of Rs. 762 was binding on the minor and the minor brought a suit to set aside the sale *held* that the proper decree to be passed, was to set

aside the sale altogether subject to the payment by the minor of the amount binding on him.

1913 M. W. N. 735 Referred to.

L. A. Govindaraghava Aiyar for Appellants.

T. R. Ramachandra Aiyar for Respondents.

Ayling and Hannay JJ.
1914, October 21.

S. A. 868 of 1913.

Suit for declaration that plaintiff is entitled to patta—Collector, whether a necessary party—Amendment of plaint in second appeal.

Where a plaintiff sued for a declaration that he is entitled to the patta of certain lands *held* that the Collector was a necessary party to the suit. The objection to non-joinder of the Collector being taken at a late stage of the suit, the plaint was amended in second appeal, into one for declaration of title.

B. Sitarama Rao for Appellants.

K. Y. Adiga for Respondents.

Ayling and Hannay JJ.
1914, *October* 21.

S. A. 720 of 1913.

*Hindu Law—Minor—Sale by guardian—*Bona fide *purchaser for value—Duty of.*

A *bona fide* purchaser for value from the guardian of a Hindu minor is not bound to see to the application of the sale proceeds. The doctrine in *Hanuman Pershad's case* applies also to the case of sales.

K. Parthasarathy Aiyangar for Appellants.

K. N. Kumarasawmi Aiyar for *L. A. Govindaraghava Aiyar* for Respondents.

Oldfield J.
Tyabji J.
1914, *October* 21.

L. P. A. 100 of 1913.

Civil Procedure Code Act V of 1908, O. 43. r. 1 cl. (r). O. 39. r. 2. cl. (3) Appeal; order refusing to send a party who has violated a temporary injunction of jail.

Per *Oldfield J.* An order refusing to send a party who has broken a temporary injunction to jail is an order appealable under O. 43, r. 1, cl. (*r*). 35 All. 425 *followed.*

Per *Tyabji, J.* (contra) Such an order in not appealable.

J. L. Rosario for Appellant.

A. Sundram for Respondent.

Oldfield J.,
Tyabji J.
1914, *October*, 23. } C. M. A. 319 of 13.

Provincial Insolvency Act—Appeal—Parties—Limitation Act, S. 14—Not applicable to application by creditor under S. 6.

To an appeal by an opposing creditor against an order of adjudication on an application by another creditor based on a transfer in his favour, the only necessary parties, (in the absence of special circumstances) are the petitioning creditor and the debtor (no receiver had yet been appointed in the case).

S. 14 of the Limitation Act cannot be availed of in computing the 3 months' limitation provided by the Provincial Insolvency Act for a creditor's petition.

B. Sitarama Rao for Appellant.

H. Balakrishna Rao for Respondent.

Sankaran Nair
Spencer JJ.
1914, *October* 26. } A. S. 61 of 1912.

Hindu Law—Adoption by widow—Improper refusal of consent by next reversioner—Consent of remoter reversioners—Adoption—Validity of.

Where a Hindu widow adopted a son with the consent of the remoter reversioners, the nearest reversioner refusing his consent on the ground that his reversionary rights would be defeated by the adoption *held* that the refusal of consent by the next reversioner was improper, being dictated solely by his personal interest, and that the consent of the remoter reversioners was sufficient to validate the adoption.

T. Prakasam for Appellants.

V. Ramdoss for Respondents.

Sadasiva Aiyar
and Napier JJ.
1914, *October* 26. } C. M. A. 7 of 1914.

Hindu Law—Joint family—Trading firm—Decree against firm—Interest of minor members in joint family property—Liability of.

Where in a suit against a *Chetty* family trading firm represented by the manager, a decree was obtained against the firm and in execution thereof the interest of certain minor members in the joint family properties was attached *held* (overruling the objection that such properties were not "partnership property" within O. 21, R. 50) that in the case of *Chetti* family trading firms the joint family properties formed the assets of the trade, and were liable to satisfy decrees against the firm.

A. Krishnaswami Aiyar for Appellants.

N. Ramachandra Aiyar for Respondents.

NOTES OF RECENT CASES.

Sadasiva Aiyar, J.,
Hannay J.
1914, October 3.

S. A. 23 of 1914.

Mortgage—Redemption—Kanom by three co-owners—Subsequent renewal by two—Suit by other co-owner for redemption of his share—Decree, form of.

Where three co-owners executed a kanom to the defendant and on the expiry of the term two of the co-owners executed renewal of the same to the defendant, in a suit by the other co-owner to redeem his ⅓ share of the properties under the original kanom, *Held* that the original kanom having been split up by the defendant's taking a renewal from 2 of the 3 co-owners, the plaintiff could sue for redemption of his ⅓ share. *Held* further, that the proper decree to be passed was that plaintiff was to be put in joint possession with the defendant the unless he consented to a partition.

Kondara Kailmanan v. *Kuttu* [1], *Thachi Chettiar* v. *Ramanatha* [2], and *Rathna Mudali* v. *Perumal Reddi*[3] followed.

Appu Nair for Appellants.

Govinda Marar for Respondents.

Wallis C. J.,
Seshagiri Aiyar J.
1914 *October* 28.

A. S. 173 of 1911.

Deed—Construction—Compromise decree providing for heritable annuity to be paid by Zemindar and his heirs—Validity of—Hindu Law—Heritable annuity whether recognised by—"Santhathiparamparyamai," meaning of—Annuity, whether a charge on Zemindari—Heir taking Zemindari under a settlement trust deed, whether liable.

A compromise decree provided that the then Rani of Ramnad and her successors should pay an allowance of Rs. 750 a year to one S, in "Santhathiparamparyam" and after the death of S. his son, D obtained a decree against the then Raja for the allowance due. The decree however was personal to D. The

1. (1882) I. L. R. 6 M. 61. 2. (1896) I. L. R. 20 M. 295.
3. (1912) 23 M. L. J. 576.

late Raja of Ramnad executed a settlement trust deed in favour of his son, the present Raja providing for a sum of Rs. 750 to be paid to D and his heirs as per decree obtained by D against the previous Raja. An assignee from the reversioner of D now sued the present Raja for arrears of the allowance.

Held i. The words "Santhathiparamparyam" denote heirs general and are not confined to the lineal heirs of S. and the plaintiff as assignee from the reversioner of S. is entitled to sue.

ii. A heritable annuity is known both to the English and Hindu Law and the compromise decree providing for such an annuity is enforceable at least against the heirs at law of the then Rani.

iii. *Per Wallis, C. J.*—The compromise does not operate to create a charge on the Zemindari.

Per Seshagiri Aiyar, J.—Having regard to the surrounding circumstances an intention to create a charge may be inferred.

iv. *Per Wallis, C. J.*—Due effect must be given to the words "D and his heirs" in the settlement trust deed and the reference to the personal decree in favour of D, in the settlement trust deed, must be treated as a surplusage or false description.

Per Seshagiri Aiyar, J.—The reference to "D and his heirs" in the settlement trust deed may have been a mistake for the compromise decree in favour of "S. and his heirs."

v. *Per Seshagiri Aiyar J.*—(overruling the contention that the present Raja who took the estate under a settlement was not an heir at law and therefore not liable to pay the annuity). The intention of the late Raja was, that, under the settlement trust deed, the present Raja should take the same estate as on an intestacy, and the present Raja was liable as heir at-law.

K. Srinivasa Aiyangar and *A. Krishnaswami Aiyar* for Appellants.

S. Srinivasa Aiyangar and *S. Sundararaja Aiyangar* for Respondents.

Sadasiva Aiyar J.,
Napier J.
1914 *October* 28.

S. A. 699 of 1913.

Specific Relief Act, S. 42—Scope of—Declaratory suit—Right to status or property—Suit for declaration that personal contract exists between parties—Maintainability of.

S. 42 of the Specific Relief Act does not exhaust all classes of declaratory suits that lie at the instance of a party. A suit for a declaration that a valid personal contract, merely regulating the pecuniary relations of the parties, subsists between them is not a suit for a declaration of status or of any right to property within S. 42 of the Specific Relief Act and is therefore not maintainable.

C. V. Ananthakrishna Aiyar for Appellants.

K. R. Subramanya Sastri for Respondents.

Sadasiva Aiyar, J.,
Napier J.
1914 *October* 28.

S. A. 2106 of 1913.

Deed—Construction—Will or settlement—Hindu Law—Will for consideration, what is—Revocability—Motives of testator different from a promise by him.

Where a document described as a will and written on unstamped paper, recited that the legatees were to take after the death of its executant and there was nothing in it to show that the interest of the executant was meant to be cut down to a life estate *held* that the document was a will and not a settlement vesting the property *eo instanti* in the legatees. A will speaks from the date of the death of the testator and is revocable at any time before.

Per Napier, J.—It is the practice of Hindu testators to recite in their wills existing and future considerations as motives for their executing the same and the legatees under them cannot be heard to say that by their acting up to the said recitals the wills are rendered irrevocable so as to defeat the right of survivorship.

Synge v. *Synge* [1], dist. *Maddison* v. *Alderson* [2] followed.

Per Sadasiva Aiyar, J.—The mere raising of expectations in a person that a bounty will be left to him by a will if he does certain things cannot be said to be a promise by the testator so as to render the will irrevocable in case the person does the things referred to in the will.

Appa Rao v. *Venkayyamma Rao* [3] followed.

S. Varadachariar for Appellants.

T. R. Venkatarama Sastri and *A. S. Visvanatha Iyer* for Respondents.

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1. (1894) I. Q. B. 466. 2. (1883) 8 A. C. 467.
3. (1908) 19 M. L. J. 106.

Ayling, J.,
Hannay J.
1914 *October* 28.

S. A. 1621 of 1913.

Court Fees Act, S. 12—Decision as to category under which suit falls, whether appealable.

A decision as to the category under which a suit falls does not come within S. 12 of the Court Fees Act and is therefore appealable.

B. Somayya for *P. Narayanamurti* for Appellants.

T. Prakasam for Respondents.

Kumaraswami
Sastri J.
1914 October 30.

S. A. 1058 of 1913.

Madras Estates Land Act, S. 13 (3), Scope of—Landlord and tenant—Rent—Contract to pay higher rate for crops raised with the help of improvements made at tenant's sole expense—Contract before the Act—Improvements effected prior to the Act—Effect.

(On a difference of opinion between Mr. Justice Sadasiva Aiyar and Mr. Justice Napier).

Held Agreeing with Napier J.

That S. 13, cl. (3) of the Madras Estates Land Act does not exempt a tenant from liability to pay a higher rate of rent for crops raised with the help of improvements made at the tenant's sole expense where the improvements had been effected before the Act came into force and where there had been a contract between the landlord and the tenant before the Act for the payment of such enhanced rent.

L. A. Govindaraghava Aiyar for Appellants.

S. T. Srinivasagopalachari for Respondents.

Sadasiva Aiyar J.,
Napier J.
1914, October 30.

S. A. 1563 of 1913.

Landlord and tenant—Covenant against alienation—No provision for re-entry in case of breach of covenant—Alienation by tenant—Validity of.

Where a lease provided that the lessee should not alienate the demised land but there was no provision for re-entry in case of alienation by the lessee *held* that the stipulation against alienation was valid, as being one for the benefit of the lessor and that the alienation in contravention of the lease was not binding on the lessor.

I. L. R. 26 M. 160 followed.

I. L. R. 36 C. 745 diss.

K. Y. Adiga for Appellants.

B. Sita Rama Rao for Respondents.

Sadasiva Aiyar, J.,
Hannay, J.
1914, *November* 5.

S. A. 2610 of 1913.

C. P. Code (Act V of 1908) S. 64—Transfer of Property Act, S. 55 (2)—Sale—Part of the consideration retained by vendee to be paid to prior attaching creditors of vendor—Subsequent attachment by plaintiff of sum retained by vendee in execution of decree against vendor—Payment by vendee to prior attaching creditors—Plaintiff whether entitled to sum retained by vendee.

Where a sale-deed provided that the vendee should pay a portion of the consideration retained by him to two attaching creditors of the vendor, and subsequently, the plaintiff attached the sum retained by the vendee in execution of a decree against the vendor. The vendee paid the amount to the two prior attaching creditors of the vendor. The plaintiff sued the vendee for the amount retained by him and paid by him, in face of the plaintiff's attachment.

Held (1) that the vendee had a right as against the vendor to pay the sum retained by him to the attaching creditors under S. 55, cl. (2) of the Transfer of Property Act (2) that the plaintiff's attachment conferred only such rights as the vendor had against the vendee at the date of attachment (3) and that plaintiff was not entitled to recover the sum retained by the vendee, the same having been validly applied in discharge of prior claims.

Iswaram Pillai v. *Taragan* [1]; 21 M. L. J. 883 followed.

T. R. Krishnaswami Aiyar for Appellants.

C. V. Ananthakrishna Aiyar for Respondents.

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1. (1913) 26 M. L. J. 127.

Sadasiva Aiyar, J.,
Hannay, J.
1914, November 5.

S. A. 2669 of 1913.

Trustee—Temple lands—Mortgage by trustee of temple lands for repairs of temple—Validity of.

A mortgagee of temple lands from the trustee is protected, if he *bona fide* advances money on the representations of the trustee, for the repairs of the temple.

L. R. 4 I. A. 52 followed.

C. V. Ananthakrishna Aiyar for Appellants.

J. L. Rozario for Respondents.

Sadasiva Aiyar, J.,
Napier J.
1914, *November* 5.

S. A. 1280 of 1913.

Transfer of Property Act, S. 52—Lis pendens—Agricultural land—Attachment in execution of decree—Lease for one year pending attachment—Validity of.

Where pending an attachment in execution of a decree the judgment-debtor leased out the attached land for one year for cultivation *held* that the lease being one for the beneficial enjoyment of the land, was not affected by the doctrine of *lis pendens* and was valid.

Gajapathi v. *Gajapathi*[1] followed.

P. Narayanamurti for Appellants.

B. N. Sarma for Respondents.

Sadasiva Aiyar, J.,
Hannay, J.
1914, *November* 5.

S. A. 2562 of 1913.

Hindu Law—Adoption—Power to adopt—Power given to widow and two others jointly—Validity of.

Where a will executed by a Hindu testator gave authority to his widow jointly with two others, to adopt a son to him *held* that the authority was ineffectual, and an adoption in pursuance thereof was invalid.

I. L. R. 27 C. 996 followed.

T. Prakasam for Appellants.

Swaminathan for Respondents.

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1. (1883) I. L. R. 7 M. 96.

NOTES OF RECENT CASES.

The Chief Justice
Seshagiri Aiyar, J.,
1914, *November* 2.

A. S. 109 of 1914.

Limitation—Trespass—Adverse possession for 12 years against Hindu father—Whether minor sons can sue to recover the property.

Where a Hindu father purported to sell immoveable property for more than Rs. 100 by an unregistered document and the purchaser, who, in law, is a mere trespasser was in possession of the property for more than 12 years against the father, minor sons who were living at the date of the commencement of adverse possession or subsequently born sons cannot sue to recover the property after the lapse of 12 years of adverse possession against the father. The father could have maintained a suit and as such time runs from the date of adverse possession.

C. A. Seshagiri Sastri for the Appellant.

A. Krishnaswami Aiyar for the Respondent.

Sankaran Nair J.,
Spencer J.
1914, *November* 5.

A. S. 189 of 1912.

Principal and agent—Authority of agent to receive goods in payment of debts to principal—Authority to make presents and illegal payments.

An agent has no authority to receive goods in payment of debts to his principal. An agent has no power to make presents or illegal payments out of the principal's moneys in his hands.

K. Srinivasa Iyengar, and *C. A. Seshagiri Sastri* for the Appellant.

S. Srinivasa Iyengar, K. Raja Aiyar and *S. Viswanatha Aiyar* for the Respondent.

Sadasiva Aiyar J.,
Hannay J.,
1914, November 5.

S. A. 2631 of 1913.

Madras Estates Land Act, S. 192—Civil Procedure Code, S. 150—Suit for rent—Transfer of suit lands from one Revenue Division to another, pending suit—Jurisdiction of the new Revenue Divisional Officer to try the suit.

Where the suit lands were originally situate within the jurisdiction of the Sattur Revenue Divisional Officer and while the suit was pending in his Court, the Local Government transferred the suit lands to the Tuticorin Revenue Division *held* that

the Revenue Divisional Officer of Tuticorin was competent to proceed with the suit even without a formal transfer of the suit to his Court. S. 150 of the Civil Procedure Code read with S. 192 of the Madras Estates Land Act, renders such an order of transfer unnecessary.

26 M. L. J. 189 followed.

S. Srinivasa Aiyangar for Appellants.

Respondents were not represented.

Sadasiva Aiyar, and Hannay JJ., 1914, November 5. — S. A. 2308 of 1913.

Deed—Construction—Lease for fixed rent—Subsequent agreement for payment of lower rent—Payment of lower rent for 20 years—Effect of Contract Act, S. 63—Subsequent conduct of parties—Admissibility of.

Where a permanent lease provided for the payment of a fixed annual rent and subsequently the parties entered into an agreement for the payment of a lower rent and such lower rent was paid and received for 20 years after the lease. In a suit for the higher rent fixed by the lease *held* that the subsequent agreement to receive lower rent was void for want of consideration, though as regards the past 20 years there might be inferred a remission of the rent due, under S. 63 of the Contract Act. *Held* further, that the subsequent conduct of the parties in paying and accepting lower rent, was not admissible in evidence in construing the lease.

T. M. Krishnaswami Aiyar for Appellants.

R. Rangaswami Aiyangar for Respondents.

Wallis C. J. and Seshagiri Aiyar J. 1914, *November* 10. — A. S. 171 of 1911.

Religious Endowments—Temple Katlai—Trustee—Adverse possession of portion of property dedicated—Effect.

It is quite competent for a person or a committee to acquire by prescription the trusteeship of a portion of the properties dedicated to a katlai in a temple, though as regards the other items included in the same dedication the trustee continues to act as such.

K. Srinivasa Aiyangar and *S. Srinivasa Aiyangar* for Appellants.

T. Rangachariar and *C. V. Ananthakrishna Aiyar* for Respondents.

Sadasiva Aiyar J.,
Hannay J.
1914, November 11.

S. A. 1553 of 1913.

Vendor and purchaser—Sale with intent to defraud creditors—Suit by vendee for possession—Maintainability of—Remedy of vendee.

A person executed a sale deed in favour of another and it was found that both the vendor and the vendee intended it to be a sham transaction with the object of defrauding creditors. The vendee brought a suit to recover the properties ostensibly sold to him. *Held* that the mere circumstance that some consideration passed from the vendor to the vendee would not confer any title on the vendee; that the vendee could not be given a charge on the properties for the amount of consideration paid by him; and that his only remedy was to sue for the money so advanced either as money lent; or as money received by the vendor for the use of the vendee.

C. S. Venkatachariar for Appellants.

N. Chandrasekara Aiyar for Respondents.

Sadasiva Aiyar, J.,
Hannay J.
1914, November 11.

S. A. 2021 of 1913.

Registration Act S. 17, cl. c. d. (ii), Mortgage,—Receipt.

Where an instrument purporting to be a receipt evidences payment of a sum of money and an agreement by which the mortgagors agree to forego the profits that will accrue to him in respect of a trade in full discharge of a mortgage debt:—*Held* such a document is not a receipt within the meaning of S. 17 d. (11) and has to be compulsorily registered under S. 17, cl. (c).

9 Bom L. R. 254 followed.

N. S. Narasimhachari for the Appellant.

M. Govindarajulu Naidu for the Respondent.

Oldfield J.
Tyabji J.
1914, *November* 12.

C. R. P. 839 of 1913.

Contract Act, Ss. 43, 44—Promissory note executed by A and B.—Acknowledgment by A—Suit by promisee against both—Suit barred against B—Decree against, and payment by A—Suit by A for contribution from B, maintainability of.

Where A and B executed a pronote in favour of a creditor and A kept the debt alive by an acknowledgment while B did not

The creditor brought a suit on the pronote against A and B and obtained a decree for the amount of the note against A, his right against B having been barred by limitation. A paid the amount of the promissory note as per decree against him and sued B for contribution. *Held* that though the foundation of the liability in a suit for contribution, arose at the date of the execution of the promissory note by the joint promisors, the right to sue for contribution arose on payment by one joint promisor of more than his share of the debt. The mere fact that the creditor's remedy against one of the debtors was barred would not affect the rights of the debtors *in terse* to claim equitable contribution.

C. Madhavan Nair for Petitioners.

M. O. Parthasarathi Iyengar and *K. S. Ganesa Aiyar* for Respondents.

Sankaran Nair J.
Spencer J.
1914, *November* 12.

A. S. 182 of 1912.

Hindu Law,—Adoption,—Validity of,—Adoption by junior widow during the life time of the senior widow—Consent of sapindas—Law of Madras.

A Junior widow has no power to adopt even with the consent of the sapindas if the senior widow is alive and is not consulted. A senior widow has a preferential right to adopt even in Madras where the law regarding adoption is different from the law of Bengal and Bombay.

5 Bom H. C. R. p. 187
I. L. R. 39 C. p. 582. } followed.

I. L. R. 28 M. 315 referred to.

V. Ramadoss for the Appellant.

T. Ramachandra Row for the Respondent.

Wallis C. J.,
Seshagiri Aiyar J.
1914, *November* 12.

A. S. 274 of 1912.

Religious Endowments—Trustee—Dealing with reversion, bad.

Where a trustee of a religious endowment granted a new lease of trust property without necessity when the prior lease had yet 10 years to run, *held* that, the dealing with the reversion by the trustee is generally objectionable.

K. Bhashyam Aiyangar for Appellants.

K. Srinivasayangar for Respondents.

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Sadasiva Aiyar J.,
Hannay, J.
1914, November 12.

S. A. 2566 of 1913.

Where a deposit is made by the mortgagor in accordance with the judgment of the Court of the first instance, and possession is taken merely on the ground that the amount is varied by the appellate Court the mortgagee cannot be given mesne profits till the date of the deposit of the deficit. The proper order is to allow the latter interest on the deficit.

B. Sitarama Rao for Appellant.

K. Y. Adiga for Respondent.

Sankaran Nair, J.
Spencer J.
1914, *November* 13.

A. S. 47 of 1913.

Hindu Law—Joint family—Purchase in the name of wife—No presumption that wife is a mere benamidar.

Where a Zamindar purchases property in the name of his wife there is no presumption that the wife is a mere *benamidar* for the Zamindar, though the case may be different if the purchase is in the name of a coparcener of a joint Hindu family.

S. Srinivasa Aiyangar and ***K. V. Krishnaswami Aiyar*** for Appellants.

K. N. Aiya and ***C. V. Anantakrishna Aiyar*** for Respondents.

Sadasiva Aiyar, J.,
Hannay, J.
1914, *November* 16.

2512 & 2547 of 1912.

Mortgagor and mortgagee—Suit for redemption—Damages for breach of covenant for title to be taken account of notwithstanding limitation—Acquiescence—Res judicata—Spontaneous growth—Estoppel—C.P.C., S. 11—Malabar Tenant's Compensation Act, Ss. 5, 10.

A mortgagee who was unable to take possession of a part of the mortgaged property is entitled under S. 65 T. P.A. to damages for breach of covenant of title which he can claim irrespective of the plea of limitation when suit is brought to redeem the other properties included in the mortgage.

Mere acquiescence which does not amount to a release does not bar such a claim.

24 All. 531 P. C. distinguished as a case before the T. P. Act.

Where a melkanomdar got possession of the property by suit without paying for the value of spontaneous growth according to the law then in force.

Held, notwithstanding that when the former is redeemed, he is entitled to be paid the value of it. The rights of the melkanomdar to the value of spontaneous growth is not limited to the growths during his tenancy but extend also to the value of the growths during the prior kanomdar's tenure.

Where in a suit for redemption by the melkanomdar with the Jenmi as a defendant it was found that the Jenmi had no title to some of the items, the latter is estopped from subsequently contending against the melkanomdar that he had title thereto.

Where a suit by a melkanomdar for redemption and possession against the Kanomdar and the strangers in possession was dismissed the Jenmi being a defendant supporting the melkanomdar.

Held, that the judgment will operate as *res judicata* against the Jenmi in the subsequent suit for redemption and possession by the Jenmi against the melkanomdars and the strangers though by reason of the michavaram, &c., the claim is valued beyond the jurisdiction of the Court which tried the former suit I.L.R. 8 M. 83 followed.

T. R. Ramachandra Aiyar and *B. Sitarama Rao* for appellant in S. A. 2512/12 and Respondent in S. A. 2547/12.

C. V. Anantakrishna Aiyar for Respondent in S. A. 2512/12 and appellant in S. A. 2547/12.

Ayling and Kumaraswami JJ.
1914, *November* 19.

S. A. No. 1056 & 2056 of 1913.

Limitation Act, arts. 83, 65—Vendor and purchaser—Covenant by vendor to indemnify purchaser against claims of mortgagee—Decree and execution against purchaser—Suit for compensation—Limitation, Starting point of.

Where the vendors of certain lands entered into a contract with the purchaser to indemnify him against the claims of a prior mortgagee and the mortgagee obtained a decree on the mortgage and executed it against the purchaser who paid the

decree-amount. In a suit by the purchaser to recover the amount so paid, from the vendor *held*, that though the purchaser could sue the vendor on the date of the decree against the former, he was not bound to do so, and that a suit within 3 years from the date when he actually paid the amount of the mortgage decree was within time as being governed by Art. 83 of the Limitation Act.

N. Rajagopalachari for Appellants.

K. S. Ganesa Aiyar for Respondents.

Wallis C. J., and Seshagiri Aiyar J. 1914, November 23.	A. S. 289 of 1912.

Hindu Law—Stridhanam—Gift to maiden daughter by father—Saudayika—Rights of daughter over property gifted.

Property given to a maiden before marriage by her father is her Saudayika Stridhanam over which she has absolute powers of disposition uncontrolled by her husband.

S. Srinivasa Aiyangar and *K. Bhashyam* for Appellants.

T. Rangachariar for Respondents.

Sadasivayar J., and Hannay J. 1914, *November* 24.	S. A. 864 of 1913.

Hindu Law—Religious Endowment—Temple—Trustee of Kattalai—Right to employ his own archakas —Muraikars, if can object.

A trustee of a *Kattalai* in a Hindu temple can have the pujas incidental to the *Kattalai*, performed by archakas appointed by himself and the *muraikars* (archakas with turns of worship) of the Temple cannot object to the performance of the puja by the archakas appointed by the trustee.

V. Visvanatha Sastri, for Appellants.

T. Rangaramanujachari and *N. Rajagopalachari* for Respondents.

Oldfield and Tyabji, JJ. 1914, November 24.	L. P. A. 15 of 1913

Appellate Side Rules, rule 75—Non-payment of batta—Case posted for orders before single judge—Dismissal for default—Application for restoration—Dismissal on merits—Appeal—Practice—C. P. C., O. 41, R. 18.

Where under Rule 75 of the Appellate Side Rules a case was posted for orders before a single judge for non-payment of batta and was dismissed for default and an application for restoration of the appeal was also dismissed but on the merits, on appeal from the latter order.

Held Per *Oldfield J*:—The original order dismissing the appeal was one which could be passed only by a Bench and not by a single judge. The proper course is to appeal against that order and not against the order refusing to restore which was good on the merits.

Per *Tyabji J*.:—The original order dismissing the appeal being one under O. 41, R. 18 C. P. C. was one which could have been passed only by a Bench under R. 75 of the Appellate Side Rules. The application for restoration was proper and the order therein must be deemed to be the final order, incorporating the original order dismissing the suit. In an appeal against the second order it is competent to the court to pass that order which ought to have been passed by the judge on the first occasion.

T. Narasimha Ayyangar for Appellants.

L. A Govindaraghava Aiyar for Respondents.

Sadasiva Aiyar J.,
Hannay J.
1914, November 24.

S. A. 2547 of 1913.

*T. P. A. S. 43—Conditions of application—*Bona fide, *without notice after due inquiry—Transferor includes transferee with notice.*

S. 43 of the Transfer of Property will apply only if the transferee takes the transferee *bona fide* without notice and after due inquiry and not otherwise.

Per Sadasiva Aiyar, J: S. 43 applies not only to the transferor but also to his transferee with notice so that any title acquired by the latter also will feed the estoppel.

H. Balakrishna Rao for Appellant.

B. Sitarama Rao for Respondent.

Wallis C. J. and
Seshagiri Aiyar J.
1914, November 26.

A. S. No. 104 of 1913.

Madras Estates Land Act, Ss. 8, 185—Land once ryoti—Subsequent treatment by Zemindar as Kambattam—Effect.

Lands proved to have been once ryoti cannot become the Kambattam (private land) of the Zamindar by any subsequent treatment by the Zamindar as Kambattam.

L. A. Govindaraghava Aiyar and *C. V. Ananthakrishna Aiyar* for Appellants.

V. Ramesam and *V. Ramdoss* for Respondents.

Sankaran Nair J., and Spencer J.
1914, *November* 30.

A. S. 121 of 1912.

Limitation Act, S. 10, Art. 127—Hindu Law—Partition—Amount set apart for a specific purpose—Failure of the object, specific trust.

Where 2 brothers A and B at a partition in 1893, set apart with B 2 sums of money for digging an *urani* and other common purposes and it was agreed that in case the moneys are not so spent, they are to be divided equally between the brothers, and B died in 1896 without utilising the moneys for the objects, and A's sons,—A being alive—brought a suit against B's sons in 1910 on their attaining majority to recover their shares of the money on the grounds that the moneys were joint property and that the case was one of express trust and so S. 10, Limitation Act applied.

Held, the family having become divided in 1893, the moneys were not joint property and Art. 127 did not apply.

Held further, the suit being to recover the moneys on the failure of the objects and not for the purposes of the trust, S. 10 did not apply; as the father could have given a discharge, the sons were barred by limitation.

T. Rangachariar for the Appellants.

K. Raja Aiyar for the Respondents.

Wallis C. J., and Seshagiri Aiyar J.
1914, *December* 2.

A. S. No. 175 of 1907.

Hindu Law—Widow—Maintenance of step-mother—step-son whether liable jointly with the son.

Under the Hindu Law, both the son and the step son are equally liable to contribute to the maintenance of a widow, since both of them take the property of the widow's husband.

P. Narayanamurti for Appellants.

K. V. L. Narasimham and *V. Ramesam* for Respondents.

Wallis, C. J., and
Seshagiri Aiyar, J.,
1914, *December* 2.

A. S. 58 of 1912.

Tort—Damages—Negligence of employee—Liability of Secretary of State for India.

The Secretary of State for India is not liable in damages for injury caused to a person by the negligence of a contractor employed by the Government for repairing a public road.

The *Government Pleader* for Appellants.

T. Narasimha Iyengar for Respondents.

Sadasiva Aiyar, J.,
and Hannay J.,
1914, *December* 2.

S. A. 2007 of 1913.

Res judicata—Specific Relief Act, S. 9—Suit for possession and mesne profits—Decree silent as to mesne profits—Subsequent suit for mesne profits—No bar.

In a suit under S. 9 of the Specific Relief Act for possession and mesne profits the decree was silent as to mesne profits. In a subsequent suit for mesne profits for the same period *held* that the prior suit was not a bar to the second suit, inasmuch as the suit for possession and the suit for mesne profits were founded on distinct causes of action, and the Court in a suit under S. 9 of the Specific Relief Act was not bound to give a decree for mesne profits. Neither S. 11 nor O. 2, r. 2 applies to the case.

C. S. Venkatachariar for Appellants.

K. V. Krishnaswami Aiyar for Respondents.

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